89-788

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

VENUS INDEPENDENT SCHOOL DISTRICT,
GRANDVIEW INDEPENDENT SCHOOL DISTRICT,
and JOHNSON COUNTY SPECIAL
EDUCATION COOPERATIVE,
PETITIONERS

v.

SHELLY C., b/n/f
MR. AND MRS. SHELBIE C.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October, 1989

QUESTION PRESENTED FOR REVIEW

May attorney's fees be awarded under the Handicapped Children's Protection Act, 20 U.S.C. § 1415(e)(4)(B), when settlement is reached prior to any administrative hearing or court proceedings?

LISTING OF PARTIES

Venus Independent School District - Defendants/Appellants/ Petitioners

Grandview Independent School District - Defendants/Appellants/ Petitioners

Johnson County Special Education Cooperative - Defendants/ Appellants/Petitioners

Shelley C., b/n/f Mr. and Mrs. Shelbie C. - Plaintiffs/Appellees/ Respondents

Texas Association of School Boards - Amicus Curiae

Martha C. Wright of Wright & Associates, P.C., Attorney For Defendants/Appellants/Petitioners

Mark Partin of the Advocacy, Inc., - Attorney for the Plaintiffs/ Appellees/Respondents

TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was made and entered on August 2, 1989. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 20 U.S.C. § 1415(e) of the Handicapped Children's Protection Act which provides in pertinent part:

> "(e) Civil Action; jurisdiction; attorney fees
>
> "(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.
>
> "(e)(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.
>
> "(e)(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.
>
> "(e)(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.
>
> "(e)(4)(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

"(e)(4)(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

"(e)(4)(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if —

"(e)(4)(D)(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

"(e)(4)(D)(ii) the offer is not accepted within ten days; and

"(e)(4)(d)(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

"(e)(4)(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

"(e)(4)(F) Whenever the court finds that —

"(e)(4)(F)(i) the parent or guardian, during the course of the action or preoceeding, unreasonably protracted the final resolution of the controversy;

"(e)(4)(F)(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

"(e)(4)(F)(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

"(e)(4)(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local

educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section."

NO._____

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Attorney for Petitioners

October, 1989

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari issue to review the judgment entered in the United States Court of Appeals for the Fifth Circuit on August 2, 1989.

STATEMENT OF THE CASE

A. Nature of the case

Respondent, Shelley C. is a handicapped child enrolled in the Venus Independent School District. She brought an appeal of her Individualized Education Program before a Special Education Hearing Officer for the State of Texas by filing her request for a due process hearing on September 8, 1986 (Cause No. 005-SE-986). The parties settled their dispute on February 17, 1987. The Respondent's request for a hearing before the Special Education Hearing officer was subsequently dismissed on June 26, 1987.

On February 24, 1988, the Respondents filed an action against Venus Independent School District, Grandview Independent School District, and Johnson Special Education Cooperative in the United States District Court for attorney's fees and costs incurred in pursuing this matter (Cause No. CA-3-88-0377-C). The parties filed cross motions for summary judgment. On December 15, 1988 the Court granted Respondents a summary judgment for attorney's fees in the amount of $30,533.62. (Record page 531-532)

The Petitioners timely filed their notice of appeal from the decision of the district court and timely filed their appellants' brief in the Fifth Circuit Court of Appeals for the 5th Circuit. On August 2, 1989, the Fifth Circuit Court of Appeals remanded the cause to the district court in order to make a factual determination as to the properness and reasonableness of an award of attorney's fees. However, the court found, as a matter of law, that an award of attorney's fees for work done during settlement negotiations without resort to administrative or court proceeding was proper. Therefore, this Petition for Writ of Certiorari was timely taken only on the issue of whether attorney's fees may be awarded under the HCPA when the matter is settled prior to an administrative hearing.

B. Statement of Facts

The Respondents filed an application for attorney's fees under 20 U.S.C. § 1415(e)(4)(B), the Handicapped Children's Protection Act (HCPA), asserting that the Venus Independent School District is liable for said fees (Record page 1-63).

The VISD is a public school district organized pursuant to the laws of the state of Texas. Shelley C. is a student classified as Handicapped under 20 U.S.C. 1400 et. seq. The Education for all Handicapped Children Act (EHCA).

On October 3, 1986 a prehearing conference was held wherein the Respondent stated that the only issue was the quality of suctioning (Record pages 305-308).

The Petitioners first wrote the Respondents on November 13, 1986 offering to:

1. provide suctioning of tracheostomy tube as previously agreed.
2. assure it is done in sterile manner.
3. have training for personnel administering suction.
4. provide contingency plan when nurse unavailable.
5. schedule ARD to address psychological counseling. (Record page 336-337)

Our letter to the Respondents of December 17, 1986 confirmed the agreements reached by the parties in the ARD meeting of December 2, 1986. The parties agreed that:

1. The plaintiffs were satisfied with the goals.
2. Her PE program was outlined.
3. Psychological assessment was made and approved.

On December 22, 1986, the parties made further agreements, confirmed in writing in a letter on that day. In addition to the items requested and agreed to on December 2, 1986, the Respondents further requested that Mrs. C. be allowed to:

1. train nurses and back up personnel on suction and nebulizer.
2. retrain personnel on that equipment at the beginning of each school year.
3. be involved in training on any new suction or nebulizer equipment.

The Petitioners agreed to provide all of the above. (Record pages 91-92).

In a letter written on December 24, 1986, the attorney for the Respondents rejected the Petitioner's offer stating only that it lacked specificity but failing to outline the terms the Respondents believed were not specific. (Record pages 338-339) The Petitioners responded on January 8, 1987 with an attempt to outline the agreement with more specificity. (Record pages 340-341)

The Respondents replied on January 13, 1987 stating that the January 8, 1987 letter addressed all of the issues and set out several "minor" points for clarification. (Record page 342 - 344).

On February 17, 1987, an Assessment, Review, Dismissal (ARD) Meeting was held wherein an agreement was reached. The School Health

Plan agreed to at that time contained no provision to which the Petitioners had not agreed more than 10 days earlier. (Record page 359-364)

No hearing was convened. All parties agreed to the ARD (Record page 93-166).

Shortly thereafter, the hearing officer filed an Order of Dismissal, due to the settlement reached by the parties (Record page 32). The hearing officer refused to sign an order proposed by Respondents' counsel which would have named plaintiff a prevailing party. (Record pages 272-273).

On February 24, 1988, the Respondents filed an action against Venus Independent School District, Grandview Independent School District, and Johnson County Special Education Cooperative in the United States District Court for the Northern District of Texas for attorney's fees and costs incurred in pursuing this matter (Cause No. CA-3-88-0377-C). The Petitioners filed a Motion to Dismiss that was denied by the court. (Record pages 146-147, Appendix A). On December 15, 1988 the court granted Respondents a summary judgment for attorney's fees in the amount of $30,533.62. (Record page 531-532, Appendix B).

The Petitioners timely filed their notice of appeal from the decision of the district court and timely filed their appellants' brief in the Fifth Circuit Court of Appeals. On August 2, 1989, the Fifth Circuit Court of Appeals remanded the cause to the district court in order to make a factual determination as to the properness and reasonableness of an award of attorney's fees. However, the court found, as a matter of law, than an award of attorney's fees for work done during settlement negotiations without resort to administrative or court proceeding was proper. Therefore, this Petition for Writ of Certiorari was timely taken only on the issue of whether attorney's fees may be awarded under the HCPA when the matter is settled prior to an administrative hearing.

SUMMARY OF ARGUMENT

As a matter of law, the Respondents were not entitled to an award of attorney's fees based on 20 U.S.C § 1415 (e) (4)(B). This section allows the award of attorney's fees for parties who prevail in an action brought under the Handicapped Children's Protection Act. Subsection (e) states that an award may be made to a party who prevails under *this subsection* (emphasis added). The subsection is entitled "Civil Action; Jurisdiction; Attorney's Fees." The section only refers to civil actions.

The Respondents are only entitled to attorney's fees incurred during an administrative hearing if there is a lawsuit subsequently filed. The Court of Appeals for the District of Columbia Circuit in the *Lani Moore v. District of Columbia*, Docket No. 88-7003, (D.C. Cir. June 20, 1989), (discussed below) has recently held that a "prevailing party" is not entitled to attorneys fees for work done at the administrative level when the matter was not appealed to the district court. There are no cases which hold that a party may recover attorney's fees when a matter is settled prior to an administrative proceeding. On the contrary, in *Dodds v. Simpson*, 1987-88 EHLR DEC. 559:320, (discussed below) the court found that no party may recover attorney's fees if the parties settled their dispute prior to an administrative hearing without any further litigation. An award of attorneys fees for settlement negotiations where no administrative hearing is held is contrary to public policy. Title 20 U.S.C § 1415 was amended to provide an incentive to settle. To award fees from the moment a dispute arises would provide no incentive to settle. Therefore, the trial Court erred in denying the Petitioner's motion to dismiss and erred in granting the Respondent's motion for summary judgment.

THE COURT OF APPEALS ERRED IN FINDING THAT ATTORNEY'S FEES MAY BE AWARDED UNDER HANDICAPPED CHILDREN'S PROTECTION ACT WHEN SETTLEMENT IS REACHED PRIOR TO ANY ADMINISTRATIVE HEARING OR COURT PROCEEDING.

A. THE FEES WERE INCURED IN SETTLEMENT WITHOUT RESORT TO AN ADMINISTRATIVE HEARING OR COURT PROCEEDING.

The Respondents filed an application for attorney's fees under 20 U.S.C. § 1415(e)(4)(B) (Appendix C) which allows for the award of attorney's fees to parties who prevail in an action brought under the Handicapped Children's Protection Act (HCPA). This act provides for the award of attorney's fees pursuant to any action or proceeding brought under subsection (e) 20 U.S.C. § 1415(e)(4)(B). The subsection is entitled "Civil Action; Jurisdiction; Attorney's Fees." Subsection (e) specifically addresses civil action that may be taken by an aggrieved party. It provides that a party who wishes to appeal the findings of the State Education Agency "shall have the right to bring a Civil Action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States." Subsection (e) goes on to read that attorney's fees may be awarded to a party who prevails in an action brought under *this subsection* (emphasis added). This provision (20 U.S.C. § 1415(e)(4)(B) only refers to actions brought under subsection (e); that is, only civil actions brought in State or U.S. District Court. There is no provision allowing for attorney's fees in subsections (a), (b), (c) or (d). The Respondents' complaint was made pursuant to subsections (b) and (c). The Respondents have never brought, and have never claimed to bring, an action in the state or United States District Court to appeal the findings or decisions made under subsections (b) or (c). The Respondents are therefore not entitled to an award of attorney's fees, for such fees are only provided for in actions brought under subsection (e). Thus, the Court erred in finding that they could be awarded such fees.

The Respondents claim they right to recover attorney's fees even though a settlement was reached prior to a hearing. The Respondents cite cases wherein a party can be entitled to recover attorney's fees even though a settlement was reached. The Respondents further cite cases wherein a party can be entitled to recover attorney's fees for services rendered in an administrative proceeding. However, there are *no* cases that hold a party is entitled to recover attorney's fees when a matter is settled *prior* to an

administrative proceeding. The Respondents may be able to recover attorney's fees for services performed during settlement negotiations but not when the matter is settled prior to any administrative hearing or court proceeding.

On the contrary, one case cited by the Respondents holds just the opposite. The Respondents asserted that *Dodds v. Simpson*, 1987-88 EHLR DEC. 559:320, (Appendix F) is distinguishable from the present case and thus does not control. The Petitioners argue that it does. The parties in the *Dodds* case settled their dispute prior to an administrative hearing, just as the parties did in the present case. However, the Respondents argue that this is distinguishable because the parties in *Dodds* went on to litigate *other* issues. What the parties did on issues not involved in the due process hearing seems to be totally irrelevant to the present case. This case involves the award of attorneys fees for the settlement of issues pending before a hearing officer prior to the holding of a hearing. As a matter of fact, subsequent litigation would seem to more likely justify an award of attorney's fees because fees are specifically allowed for administrative proceedings when an action is later litigated in the courts. Yet, the Court found the Respondents in that case to be entitled to no attorneys fees.

However, this is not the case here. The parties in this case settled their dispute prior to an administrative hearing without any further litigation. The Court in *Dodds* when considering this very situation, stated:

> assuming that under the new amendments I have discretion to award fee to a party who obtains the relief sought through settlement, prior to administrative hearing, I decline to award such fees and costs. The act is designed to resolve issues at the administrative level and to avoid costly litigation. The parties successfully reached a settlement prior to the due process hearing, the parties avoided both the costs of the formal due process hearing and subsequent litigation over Kevin's rights to special education. To find Defendant's liable for fees and costs would create a disincentive for such prehearing settlements and the interest of promoting such settlements I decline to award fees and costs. *(Dodds v Simpson*, 1987-88 EHLR DEC. 559:320).

The facts in *Dodds* are identical to the present case and the Petitioners urge this Court to adopt the reasoning of the court in *Dodds* in deciding this case.

The Respondents are only entitled to attorney's fees incurred during an administrative hearing if there is a lawsuit subsequently filed. The seminal Supreme Court case on this issue is *North Carolina Department of Transportation v. Crest Street*, 479 U.S. 6, 107 S. Ct. 336 (1986). In *Crest Street* the Supreme Court examined whether the Respondent was entitled to attorney's fees for preparing an administrative complaint and for negotiating a resolution.

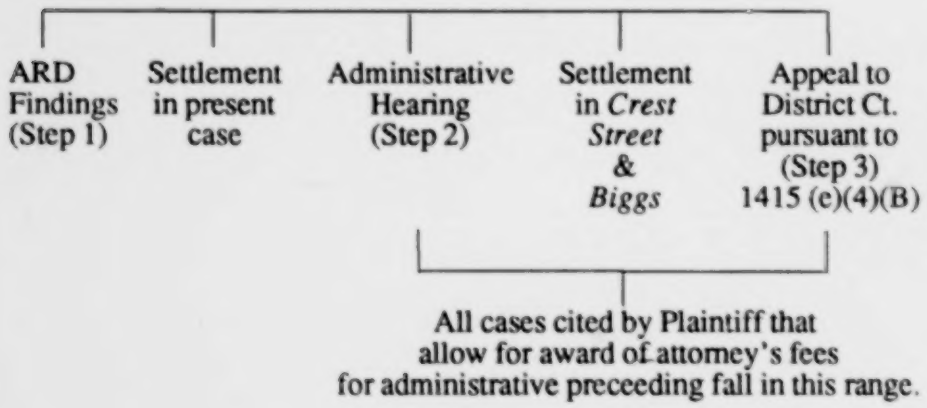
The Court looked at the legislative history on awards of attorney's fees and found many references to the enforcement of civil rights statutes "in suits," "through the courts," and "by judicial process." *S. Rep. No. 94-1011, p. 5 (1976)*. The cases cited in the Senate report as well as the House report examined by the Court in *Crest Street*, involved, at the *minimum*, the filing of a judicial complaint. The House report examined by the Court in *Crest Street* stated that even though it was not necessary that the "prevailing party" received a final judgment upon full trial on the merits, it was clear that "parties obtaining fees would have initiated civil rights litigation." *Crest Street*, 107 S. Ct. at 340. "The legislative history clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit." *Crest Street*, 107 S. Ct. at 341). The Court goes on to say that there are many things that may lead a party to comply with the civil rights laws, but an award of attorney's fees is dependent not only on whether the party obtained the desired results, but also on what actions he was required to take. "It is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Id.*

Any discussions made in the Congressional Record are regarding the possibility of an award of attorney's fees by a district court for administrative proceedings in a lawsuit brought solely for those attorney's fees. In the present case, a lawsuit was brought for the award of attorney's fees for fees incurred prior to administrative proceeding when an administrative proceeding had never been held.

In *Crest Street*, the Supreme Court held that the district court may not award attorney's fees under 42 U.S.C. § 1988 in a separate action brought solely to recover fees incurred in the administrative proceedings. The Supreme Court stated that "it is entirely reasonable to limit the award of attorney's fees under section 1988 to those parties who, in order to obtain relief found it necessary to file a complaint in court." 107 S. Ct. at 341.

The Court in *Crest Street* found that a party may be entitled to attorney's fees for administrative proceedings that were "useful and of a

type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." 107 S. Ct. at 342. However, it found that only a court in an action to enforce those civil rights laws can award attorney's fees. It found that the party in that case did not seek their fees in the Title VI action, but instead agreed to dismiss their proposed complaint and brought an independent action for the attorney's fees. These facts are almost identical to those in the present case. However, the dispute in *Crest Street* had *at least* reached the administrative proceeding level. The Plaintiff in this case did not even complete an administrative hearing much less file a complaint in the district court prior to settlement. Perhaps a graphic illustration of the course of administrative proceedings might be helpful to illustrate this point (comparing *Crest Street* to the instant case):



Another difference between the present case and the *Crest Street* decision is that the seeking party in *Crest Street* brought their action under Title VI instead of under HCPA as was done in this case. However, the district court in *Rollison v. Biggs*, 660 F. Supp. 875 (Del. 1987), found the rule in *Crest Street* to apply to special education cases. Stating that the Supreme Court has held that Plaintiffs may not recover attorney's fees for prevailing in an administrative proceeding, the Court went on to apply that to cases brought under the Education of All Handicapped Children Act. "Because Congress intended that the HCPA be construed with other fee-shifting statutes, the rule of *Crest Street* applies in special education cases brought under the EAHCA just as the rule applies in other civil rights cases." 660 F. Supp. at 877. The Respondents in that case, as in *Crest Street*, and the present case brought an independent action for attorney's

fees. The Court specifically held that the Plaintiff could not bring a civil action for the sole purpose of recovering attorney's fees.

Section 1415(e)(2) permits a "party aggrieved" by the administrative decision to bring a civil action. However, in this case, the Respondents were not a "party aggrieved" by an administrative decision since there was not even an administrative proceeding from which to "prevail". Section 1415 only addresses parties who are "aggreived by the administrative decision in their case." The Respondents here clearly can not be aggreived of an administrative decision that has not occured and certainly can not be aggrieved of a settlement to which they agreed.

Furthermore, the action or proceeding must be brought "under subsection 1415(e)" for the court to be authorized to award attorney's fees. A suit for attorney's fees for services rendered in an administrative proceeding would not be "brought under" that particular subsection. A separate suit to recover attorney's fees for the adminstrative proceeding would not be "brought under" subsection 1415(e). The only reference in subsection 1415(e) to administrative proceedings is in 1415(e)(4)(d) which bars an award of attorney's fees in an action or proceeding under this subsection for services performed subsequent to the time of written offer of settlement is made.

Furthermore, the Respondents have not prevailed on the merits of the case and thus are not a prevailing party for the purposes of an award of attorney's fees. In *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672 (1987) the Supreme Court held that a plaintiff who had obtained a "favorable judicial pronouncement" regarding the merits of his claim was not entitled to attorney's fees absent a finding that he was awarded relief. In the present case, the Respondent does not even have a declaration of a hearing officer on the merits of the case. The Respondents have argued that the hearing officer's order to dismiss actually incorporated the agreement of the parties and therefore there was a finding in which they prevailed. However, this is exactly what the Respondent Shelley C. in her Motion to adopt the written IEP as the hearing officer's order asked the hearing officer to do. The hearing officer denied this motion and entered an order to dismiss without incorporating the parties' agreement. Clearly, the Respondents have no "favorable judicial pronouncements," and thus the Court erred in allowing attorney's fees without such a pronouncement.

Since an administrative proceeding has never been held the appellees in this case did not even reach the provisions of 20 U.S.C. § 1415. In *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 (1988), the Court made

it clear that "judicial review is not normally available under 1415(e)(2) until all adminstrative proceedings are completed." 108 S. Ct. at 606. As an exhaustion of all administrative remedies is required to even come under section 1415. This matter was resolved before resort to administrative remedies was sought. Section 1415 only addresses remedies sought in the administrative proceedings. There is a dispute among the circuits as to whether attorney's fees are allowable at the administrative level but clearly, they do not apply to situations in which an administrative proceeding was not held. In the present case, administrative proceedings were not only not completed but never even begun. Therefore, the appellees do not ever even reach section 1415(e) and are clearly not entitled to attorney's fees incurred in the settlement nego tiations.

The Respondents argue that *Duane M. v. Orleans Parish School Board*, 861 F.2d 115, (5th Cir. 1988) applies to this case. They state that this case stands for the proposition that attorneys fees are available for parties who prevail at an administrative proceeding. The Petitioners have no disagreement with this statement. However, the circumstances of this case are different. The parties in the present case did not ever reach an administrative proceeding. Therefore *Duane M.* does not control this case.

The Respondents argue that the case of *Robert H. v. Fort Worth ISD*, EHLR DEC. 559:509 (N.D. Tex. June 1, 1988) is very similar to the present cause except that "the parties entered a settlement agreement, a step that the defendants in this cause refused to take." Not only is this an irrelevant distinction, it is completely contrary to the facts in this case. The Petitioners agreed to the written IEP finally decided upon by all the parties at the February 17th ARD. As discussed above, the Respondents presented the Petitioners with an agreed order of dismissal that encompassed the parties agreement. However, the hearing officer had already notified the parties that he refused to enter such an order. Therefore, the attorney for the Petitioners did not sign the order. No other written agreement was presented. The Petitioners did not refuse to enter into a written settlement agreement. A settlement was agreed upon at the February 17th ARD.

B. LANI MOORE V. DISTRICT OF COLUMBIA

The Fifth Circuit's decision in the present case (Appendix E) is in direct conflict with the decision out of the D.C. Circuit in *Lani Moore v. District of Columbia*, Docket No. 88-7003 (D.C. Cir., June 20, 1989) (Appendix D). The Petitioners respectfully request this Court to resolve the conflict between the circuits on this issue. The court in *Lani Moore* held that section 1415(e)(4)(b) of Education of the Handicapped Act did not authorize the Court, in a suit brought solely for the purpose of awarding attorney's fees, to award such attorney's fees for services rendered during administrative proceedings. The decision is in direct conflict with the Fifth Circuit holding that attorney's fees may be awarded services rendered *even prior to* administrative proceedings.

The District of Columbia court began analyzing this decision by analyzing the statute itself. They found that the words "brought under this subsection" are referring to subsection (e) only. They stated that when Congress wished to make a reference more broad or to refer to other provisions in the statute, it did so explicitly. (ie. subsections 1415(e)(2) and (3)). The only reference made to bringing actions or proceedings is in subsection 1415(e)(2): "Any party aggreived by the findings and decisions made under subsection (b) of this section... and any party aggreived by the findings and decisions under subsection (c) of this section shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in the district court of the United States." 20 U.S.C. §1415(e)(2).

Attorney's fees may be awarded only to someone who's prevailed in "an action or proceeding" brought under section 1415(e). The court in *Lani Moore* found that the fact that the respondents were the prevailing parties in the adminstrative proceedings did not make the "prevailing parties" to whom subsection 1415(e)(4)(B) authorizes the award of attorney's fees. This will be particularly true in our case as the Respondents were not prevailing parties in an administrative proceeding as there was no administrative proceeding ever held.

The District of Columbia Circuit discussed the fact that the wording of the statute is that attorney's fees are to be awarded as "part of costs". They found that if attorney's fees were awarded in a suit brought solely to obtain the fee, the fee could not be brought as "part of the costs" since the fee is the sole object of the suit. They found that this indicates that the language

of Congress in subsection 1415(e)(4)(B) provided that the award of attorney's fees applies only in cases in which the party who lost an administrative proceeding brought a judicial action challenging the administrative decision and prevailed in that judicial action.

The District of Columbia Circuit in *Lani Moore* found that the Supreme Court's decision in *Crest Street* applied to this issue. "(J)ust as a suit for attorney's fees is not an 'action or proceeding to enforce...title VI of the Civil Rights Act' so the suit for attorney's fees in the present case is not one 'brought under' subsection 1415(e). In this respect the present case parallels *Crest Street*... There is no reason why this principle should not be less applicable to the award of such fees under subsection 1415(e)(4)(B)."

The court analyzed some of the cases holding that *Crest Street* did not apply to the present situation. (i.e. *Duane M.* as discussed above) These cases distinguish *Crest Street* on the basis that, unlike the EHCA, Title VI, does not require that the claimants execute state or local administrative remedies prior to suing. However, the court in *Lani Moore* found that the analysis in *Crest Street* "did not turn on whether the adminsitrative proceeding is 'mandatory or optional...integral or peripheral to the enforcement scheme'". 479 U.S. at 22. Rather, the Court's decision was based on the language of the fee provision there at issue."

The District of Columbia Circuit then proceeded to analyze the legislative history behind 1415(e) in great depth. Senator Weicker in introducing the legislation stated that the bill was designed to make reasonable attorney's fees available to parents of handicapped children who prevail in a civil court action. The committee discussed but declined to adopt, a bill with a much more complicated attorney's fee provision. That bill stated that if the school system used an attorney at the administrative level it would have to pay for an attorney to represent the parent of the handicapped child. It stated that whenever a parent prevailed at the administrative level and the school system appealed the administrative decision, the parent shall be awarded a reasonable attorney's fees. The committee's refusal to adopt this bill indicates their reluctance to award fees for negotiation only.

In discussing the bill, the committee stated that they intended that it would be interepreted consistently with other fee provision statutes such as Title VII of the Civil Rights Act which provide for the award of attorney's fees to parties who prevail in court to obtain what is guaranteed to them by law. 132 Congressional Record 16823 (1986). Senator Wiecker stated that this legislation will "restore to parents of the handicapped children the right

to be awarded attorney's fees and other reasonable expenses when they must go to court to secure the educational rights promised to them by Congress". 131 Congressional Record 21389-90. Senator Carey stated that the bill was specifi cally designed to enforce the right of the handicapped to have access to the Courts when education is being denied them. Id. 21391-92.

The court in *Lani Moore* drew the following conclusions from their analysis of the legislative history:

(1) that the house intended to authorize the district courts to award attorneys fees for services rendered in the administrative proceeding in a suit brought solely for that purpose and believed that the language in the senate bill "in an action or proceeding brought on the subsection accomplished that result."

(2) that there was no clear expression of the Senate's intention. However, it was clear that Senator Wiecker, who introduced the bill and was the leader in its development, stated on a number of occassions that the bill provided for attorney's fees to parents who prevailed in Court proceedings.

(3) that any discussion by the conferrees on rejecting the sunset provision that would provide for any award of attorney's fees during administrative level would cease in four years does not establish that the conferrees believe that the bill that they recommended granted any such authority to allow attorney's fees at the administrative level. The conferrees could have believed that they did not want to limit it to four years or that they did not believe the conference bill contained the authority to award attorney's fees so there was no reason to terminate it after that time.

The court concluded that they "cannot say that viewed in its entirety the legislative history reflects 'clearly expressed legislative intention to the contrary' of 'the language of the statute itself'. *Consumer Product Safety Commission*, 447 U.S. at 108. That would justify the departure from the statutory language. Such a departure would be required to hold that the act authorizes the award of attorney's fees for services rendered in the adminstrative proceeding." *Lani Moore v. District of Columbia*, Docket No. 88-7003 (D.C. Cir., June 20, 1989) The court acknowledged that several other cases in other circuits have been decided the other way, however, they find that none of the opinions that have authorized the award of attorney's fees at the administrative level provided the detailed analysis

of the statutory language and the legislative history as was made in this case. This was certainly true in the case presently on appeal. In the present case, there was no discussion of the legislative history or the statutory language in the Fifth Circuit's decision in the present case.

The court in *Lani Moore* therefore concludes that Congress did not authorize the district court to award attorney's fees for services in the administrative proceedings in a suit brought solely to obtain such fees. This is contrary to the decision made in the present case by the Fifth Circuit. However, there are even more compelling reasons for the decision in the present case to be reversed. Not only is there a conflict as to whether attorney's fees can be awarded at the administrative level, but the facts in this present case are that no administrative proceeding was held. There was a settlement prior to the holding of an administrative hearing. Clearly, the legislature did not intend to award attorney's fees for settlement negotiations prior to an administrative hearing.

C. AN AWARD OF ATTORNEY'S FEES WHEN THEIR WAS NO ADMINISTRATIVE HEARING IS CONTRARY TO PUBLIC POLICY.

The Respondents argued that without the threat of an award of attorney's fees for settlement negotiations there would be no incentive to settle. However, just the opposite would appear to be true. If no fees are awarded prior to an administrative hearing, but fees *are* awarded once a hearing is held, then there is a strong incentive to settle prior to a hearing. This seems to be in line with the legislative intent. If fees are awarded at all times, there is not an incentive to settle at any particular time in the proceedings. The legislature clearly intended to amend 20 U.S.C. § 1415 (e)(4)(D) to provide an added incentive for settlement.

Critics of the bill when it was in the legislature were fearful that the availability of attorney's fees would increase litigation. Senator Stafford responded by saying "it is my belief that the opposite situation will occur. State and local education agencies will be more inclined to work out effective compromise with parents before court action becomes necessary." 131 Congressional Record 21390.

The Respondents stated that to disallow attorney's fees prior to an administrative hearing "would provide no incentive for school district to settle an 'action or proceeding' prior to the hearing because they would be working under the presumption that there is no liability for attorney's fees unless they fail to settle and then actually enter the hearing."(Record page 494) The new provision provided that attorney fees are not allowed if a

reasonable settlement offer is made ten (10) days prior to the due process hearing. If a party thinks that "there is no liability for attorney's fees unless they fail to settle," then that party is going to do everything they can to keep from failing at settlement. The converse will also be true. That is, if attorney's fees are to be awarded whether or not there is an administrative hearing there is nothing to make the party fear failing to settle. They thus have no incentive to settle prior to the administrative hearing.

CONCLUSION

Clearly strong public policy as well as the legislative intent would dictate that settlement should not be jeopardized simply to allow for the collection of attorney's fees.

As a matter of law, the Respondent is not entitled to attorney's fees for the settlement of a dispute prior to the institution of administrative proceedings.

PRAYER

FOR THE FOREGOING REASONS, the judgment of the District Court for the Northern District of Texas and the judgment of the Fifth Circuit Court of Appeals as to the above issue should be reversed and summary judgment granted in favor of the Petitoners.

Respectfully submitted,

Martha C. Wright
State Bar No. 22048800

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was sent via certified mail, return receipt requested to Mark Partin, Advocacy, Inc., 7800 Shoal Creek Blvd. Suite 171E, Austin, TX 78757 on the 16th day of November, 1989.

Martha C. Wright

TABLE OF APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHELLY C., b/n/f
MR. AND MRS. SHELBIE C.,

Plaintiff

V.

VENUS INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants

§ Civil Action No.
§ CA-3-88-0377-C

ORDER

On this day came on to be considered the motion to dismiss filed by the defendants in the above styled and numbered cause. Having reviewed the pleadings on file, the Court is of the opinion that the motion should be denied.

The defendants contend that this Court lacks jurisdiction and that plaintiff's application for attorney's fees fails to state a cause of action under Rule 12 of the Federal Rules of Civil Procedure. The primary point of controversy is whether the absense of an actual administrative hearing precludes recovery of such expenses.

The law is well settled as to the appropriateness of an award of attorney's fees incurred during proceedings under the Handicapped Children's Protection Act, 20 U.S.C. § 1415 (e)(4)(B). See e.g., Kristi W. v. Graham Independent School District, 663 F.Supp. 86 (N.D. Tex. 1987); Burpee v. Manchester, 661 F.Supp. 731 (D. N.H. 1987). The Court concludes that negotiations prior to a hearing constitute "proceedings" within the intent of Congress, and the lack of ultimate hearing should not affect the right to recover expenses incurred up to that point. Consequently, the Court finds that jurisdiction has been properly invoked, and a cause of action has been stated by the plaintiffs.

Therefore, it is ORDERED, ADJUDGED AND DECREED that defendants' motion to dismiss be denied, and it is further ORDERED that an answer be filed on their behalf within ten days from this date.

The Clerk shall furnish a copy hereof to each attorney of record.

Entered May 12, 1988.

/s/
Sam R. Cummings
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHELLY C., b/n/f MR. AND MRS. SHELBIE C., Plaintiff V. VENUS INDEPENDENT SCHOOL DISTRICT, et al., Defendants	§ § § § § § § § § § § § § § §	Civil Action No. CA-3-88-0377-C

SUMMARY JUDGMENT

On this day came on to be considered the cross motions for summary judgment filed by the parties in this cause. Having reviewed the pleadings on file, the arguments of counsel, the amicus curiae brief, and the supporting documents, the Court is of the opinion that the plaintiff's motion for summary judgment should be granted.

The plantiff has filed its application for the attorney's fees under the Handicapped Children's Protection Act, 20 U.S.C. §1415(e)(4)(B). The defendant asserted in its motion to dismiss, which was denied by this Court, and in its motion for summary judgment, that an award of attorney's fees for work done at the administrative level is not proper unless the merits of the case reach the court. However, this Court, in the order denying the motion to dismiss, concluded that negotiations prior to a hearing do constitute "proceedings" within the statute and that the lack of an ultimate hearing would not effect the right to recover expenses incurred in pursuing remedies under the Act. *See e.g., Kristi W. v. Graham Indep. School Dist.*, 663 F. Supp. 86 (N.D. Tex. 1987); *Burpee v. Manchester*, 661 F. Supp. 731 (D. N.H. 1987).

Based upon this Court's finding that the plaintiff is a prevailing party within the meaning of 20 U.S.C. § 1415(e), and that the affidavits filed by the attorneys for the plaintiff concerning their fees, this Court awards the following:

(1) attorney's fees for the services of plaintiff's attorney to represent her through her appeal and application, in the amount of $24,000.00;

(2) an award of costs incurred pursuing administrative remedies, in the amount of $819.87;

(3) an award of reasonable attorney's fees for hours expended in pursuing this cause of action for the recovery of reasonable attorney's fees, in the amount of $5,593.75; and

(4) an award of costs incurred in pursuing this cause of action for recovery of reasonable attorney's fees, in the amount of $120.00.

It is so ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record. Entered December 15, 1988.

/s/
Sam R. Cummings
United States District Judge

s 1415. Procedural Safeguards

Establishment and Maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit-

(i) proposes to initiate or change,

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(b)(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded-(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction; attorney fees

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under

subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(4)(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(4)(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(4)(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(4)(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4)(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(4)(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

Effect on other laws

(f) Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter. Pub. L. 91-230, title VI, s 615 as added Pub. L. 94-142, s 5(a), Nov. 29, 1975, 89 Stat. 788. As amended Pub.L. 99-372, ss 2, 3, Aug. 5, 1986, 100 Stat. 796, 797 Pub.L. 100-630, Title I, s 102(e), Nov. 7, 1988, 102 Stat. 3294 1988 Amendment. Subsec. (b)(1)(D). Pub.L. 100-630, # 102(e)(1), substituted "informs" for "inform". Subsec. (d). Pub.L. 100-630, # 102(e)(2), redesignated former cls. (!) to (4) as pars. (1) to (4), respectively, and in par. (4), as so redesignated, added "shall be made available to the public

consistent with the requirements of section 1417(c) of this title and" following "findings and decisions". 20 USCA § 1415

LANI MOORE, ET AL.
v.
DISTRICT OF COLUMBIA, ET AL., Appellants No. 88-7003

(Civil Action No. 87-00941)
United States Court of Appeals, District of Columbia
Argued November 21, 1988
Decided June 20, 1989

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Donna Murasky, with whom Frederick D. Cooke, Jr., Corporation Counsel, and Charles L. Reischel, Deputy Corporation Counsel, District of Columbia, were on the brief, for appellants.
Michael J. Eig, with whom Matthew B. Bogin and Margaret A. Kohn were on the brief, for appellees.
Before: Edwards, Williams and Friedman, [FN*] Circuit Judges.
Opinion for the Court filed by Circuit Judge Friedman.
Dissenting opinion filed by Circuit Judge Edwards.

FRIEDMAN, CIRCUIT JUDGE

The question in this case, here on appeal from the United States District Court for the District of Columbia, is whether under the Education Of All Handicapped Children's Act ('EHA'), 20 U.S.C. section 1400 et seq., as amended by The Handicapped Children's Protection Act of 1986 ('HCPA'), 20 U.S.C. section 1415(e)(4)(B) et seq., the district court has authority to award

Attorney fees to persons who prevail in administrative proceedings under that statute, in a suit brought solely to obtain those fees. The district court held that the Act authorizes it to award Attorney fees in that situation and made an award. Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987). We hold that the Act does not give the district court authority to award such fees, and therefore reverse the district court's award.

I

A. The EHA is a comprehensive scheme providing federal funds to aid States and local agencies in complying with their constitutional obligations to provide public education for handicapped children. Smith v. Robinson, 468 U.S. 992, 1009 (1984); Hendrick Hudson Dist. Bd. of Educ. v.

Rowley, 458 U.S. 176, 179 (1982). As a condition of obtaining federal financial assistance, the States must have adopted 'a policy that assures all handicapped children the right to a free appropriate public education,' 20 U.S.C. section 1412(1), and provide procedural safeguards for the enforcement of those rights. 20 U.S.C. section 1415.

The 'free appropriate public education' required is tailored to the unique needs of the handicapped child by means of an 'individualized educational program.' Prepared at meetings between a representative of the local school district, the child's teacher, and the parents or guardians of the child, the program must include statements about the child's present level of performance, annual goals, the specific educational services to be provided, and appropriate objective criteria and evaluation procedures to determine whether educational objectives are being achieved. 20 U.S.C. section 1401(19).

The EHA sets forth a number of procedural safeguards that give parents the opportunity directly to participate in decisions concerning the education of their handicapped children. Parents have the right (1) to examine all relevant records concerning the evaluation and educational placement of their child, section 1415(b)(1)(A), (2) to receive prior written notice whenever the school district proposes or refuses to change the placement of their child, section 1415(b)(1)(C), and (3) to receive an 'impartial due process hearing' after registering a complaint 'with respect to any matter relating to the identification, evaluation, or educational placement of the child.' Section 1415(b)(1)(E). The filing of such a complaint with the school district creates the opportunity for a hearing before either the State educational agency, the local educational agency, or the intermediate educational agency, as State law provides. 20 U.S.C. section 1415(b)(2).

When the hearing is conducted by a local or an intermediate educational agency, any party aggrieved by the agency's findings and decision may obtain review by the State educational agency. 20 U.S.C. section 1415(c). Parties to that hearing or to the State review proceeding have 'the right to be accompanied and advised by counsel' and by persons with special knowledge or training regarding the problems of handicapped children. 20 U.S.C. section 1415(d).

Administrative decisions are final, 20 U.S.C. section 1415(e)(1), except that any party aggrieved by the findings and decision made at the hearing (that are not appealable to the State agency under subsection (c)) or any party aggrieved by the findings and decision of the State review proceeding may bring a civil action 'with respect to the complaint presented pursuant

to [section 1415]' in a State court or in a United States District Court. 20 U.S.C. section 1415(e)(2). In that judicial action, the court may take additional evidence at the request of a party, and 'basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.' 20 U.S.C. section 1415(e)(2).

As originally enacted, the EHA did not contain any provision for the payment of Attorney fees to parents who were the prevailing parties. Parents asserting claims under the EHA frequently joined claims based on section 504 of the Rehabilitation Act of 1973 or 42 U.S.C. section 1983 in order to take advantage of the fee-awarding provisions of those statutes. In Smith v. Robinson, 468 U.S. 992 (1984), the Supreme Court held (1) that where the EHA covered a suit brought on behalf of a Handicapped child, that Act provided the exclusive remedy for the enforcement of the child's rights, and (2) that because the EHA did not contain a provision for Attorney fees, FEES were not available in suits brought to enforce those rights.

Congress responded by enacting the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796-98 (HCPA), which effectively overturned the Supreme Court's decision in Smith v. Robinson. The HCPA amends the EHA 'to authorize the award of reasonable Attorneys' fees to certain prevailing parties, to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes.' Preamble to Pub. L. No. 99-372. B. The appellees are nine learning disabled children who prevailed in due process hearings under the EHA in the District of Columbia and were placed in various private day schools throughout the District. After the District rejected their requests for reimbursement of the attorney fees and costs they had incurred in the administrative proceedings, the appellees brought the present action in the district court for the sole purpose of obtaining such fees and costs.

On cross-motion for summary judgment, the district court held that section 1415(e)(4)(B) of the EHA (the provision added by the HCPA, that provides for the award of attorney fees), authorizes a court in a suit brought solely for that purpose, to award attorney fees for services rendered during the administrative proceedings. After an evidentiary hearing, the court awarded the nine appellees a total of $48,337.42 as attorney fees and costs covering both the administrative proceedings and the district court litigation.

II

As in every case of statutory interpretation, our analysis 'must begin with the language of the statute itself.' Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 187 (1980). The provision of this statute providing for the award of attorney fees is section 1415(e)(4)(B), which states: In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable Attorneys' fees as part of the costs to the parents or guardian of a Handicapped child or youth who is the prevailing party.

A. In determining whether this provision authorizes a court to award attorney fees for services rendered in the administrative proceeding, in a suit brought solely to obtain such fees, three things stand out:

1. The reference to 'brought under this subsection' is to subsection (e), which is one of six subsections of section 1415. When Congress wished to refer more broadly to other provisions of the statute, it said so explicitly. See, e.g., section 1412 ('to qualify for assistance under this subchapter'), section 1413(a) ('the eligibility requirements set forth in section 1412 of this title '), section 1413(a)(9) ('Federal funds made available under this subchapter '), section 1415(e)(2) ('complaint presented pursuant to this section'), and section 1415(e)(3) ('[d]uring the pendency of any proceedings conducted pursuant to this section').

The only reference in subsection 1415(e) to the bringing of actions or proceedings is the statement in section 1415(e)(2) that '[a]ny party aggrieved by the findings and decision made under subsection (b) of this section . . . and any party aggrieved by the findings and decision under subsection (c) of this section [subsection dealing with administrative proceedings by State educational agencies], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Section 1415(e)(2) permits a 'party aggrieved' by the administrative decision to bring a civil action 'with respect to the complainnted pursuant to this section [section 1415],' i.e., such party may bring suit in a State or

federal court to challenge the adverse administrative decision of the State agency. None of the appellees was a 'party aggrieved' by the administrative decision in these cases, since all the appellees prevailed in those proceedings. Cf. Robinson v. Pinderhughes, 810 F.2d 1270, 1275 (4th Cir. 1987). Since there is nothing in the provisions governing the State administrative procedures (subsections 1415(b) and (c)) that provides for the award of attorney fees in the administrative proceeding or even suggests the possibility of such an award, the appellees cannot claim that they are 'parties aggrieved ' by the administrative decision because that decision did not award them attorney fees.

Honig v. Doe, 108 S. Ct. 592 (1988), involved the 'stay-put' provision of the EHA, which provides that during the pendency of any proceeding conducted pursuant to section 1415, the child shall remain in its current educational placement. 20 U.S.C. section 1415(e)(3). In suits brought by parents challenging changes in the educational placement of handicapped children that were made during State administrative proceedings, the Supreme Court held that during such proceedings a State could not remove a child from its existing school placement on the ground that the child had engaged in dangerous or disruptive conduct in the school. In rejecting the State's claim that there should be a 'dangerousness' exception to the 'stayput' provision, the Court stated that school officials had adequate authority to deal with a 'truly dangerous child' by 'invok[ing] the aid of the courts under section 1415(e)(2), which empowers courts to grant any appropriate relief,' 108 S. Ct. at 605, and that 'school officials are entitled to seek injunctive relief under section 1415(e)(2) in appropriate cases.' Id. at 606.

We do not read the statements in Honig, which involved a quite different issue, as indicating that a suit seeking attorney fees for services rendered in the administrative proceeding would be an action or proceeding 'brought under ' subsection 1415(e). The Supreme Court there addressed the authority of a district court to grant an injunction pursuant to its power under section 1415(e)(2) to 'grant such relief as the court determines is appropriate.' In concluding that the authorized 'relief' a court may grant includes an injunction, the Supreme Court intimated no opinion on whether a suit for attorney fees is 'brought under' subsection 1415(e).

2. Attorney fees may be awarded only to a 'prevailing party.' This language refers to a prevailing party in the 'action or proceeding brought under this subsection,' i.e., attorney fees may be awarded only to someone who has prevailed in an 'action or proceeding' brought under subsection 1415(e). The fact that the appellees were the prevailing parties in the

administrative proceedings did not make them 'prevailing part[ies]' to whom section 1415(e)(4)(B) authorizes the award of attorney fees.

3. The attorney fees are to be awarded as 'part of the costs.' If an attorney fee were awarded in a suit brought solely to obtain the fee, the fee could not be awarded as 'part of the costs' in the suit since the fee was the sole objective of the suit.

The foregoing considerations indicate that the language Congress used in section 1415(e)(4)(B) provided for the award of attorney fees only in cases in which a party who lost in the administrative proceedings brought a judicial action challenging the administrative decision and prevailed in that judicial action. That provision does not provide for the award of attorney fees to someone who prevailed in the administrative proceedings and then brought a judicial action solely to obtain attorney fees for services rendered in those proceedings.

B. The appellees contend, however, that the use of the word 'proceeding ' in section 1415(e)(4)(B), in addition to the word 'action,' indicates that Congress intended to permit a judicial award of attorney fees for services rendered in the administrative proceedings in a suit brought solely for that purpose. Whatever Congress may have intended by referring to both 'action' and 'proceeding,' however, the action or proceeding must have been 'brought under ' subsection 1415(e) for the court to be authorized to award attorney fees. As we have shown, a suit for attorney fees for services rendered in the administrative proceeding would not be 'brought under' that subsection. Thus, even if the reference to 'proceeding' were deemed to mean the administrative proceeding, the statute still would not authorize the award of attorney fees without a subsequent civil action. Indeed, if Congress had intended to provide attorney fees for the administrative proceedings alone, it is surprising that Congress did not provide for the administrative tribunal, which would be most familiar with the services the attorney had rendered before it, in the first instance to pass upon the request for attorney fees, instead of requiring the prevailing party in the administrative proceeding to resort to federal litigation to obtain attorney fees incurred in those proceedings. The reason Congress used the phrase 'action or proceeding' is unclear. Perhaps the legislature merely used the same words it had used in many other statutes providing for the award of attorney fees. The word 'proceeding' may have been intended to authorize a court in a proceeding challenging an adverse administrative decision to award the prevailing party attorney fees incurred in both the judicial and the administrative proceedings. But whatever the

reason, a separate suit to recover attorney fees for the administrative proceeding would not be 'brought under' subsection 1415(e).

The only reference in subsection 1415(e) to administrative proceedings is in section 1415(e)(4)(D), which bars an award of attorney fees in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if --

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

This provision, however, does not authorize the award of attorney fees for administrative proceedings. It merely provides that a parent who rejected an offer of settlement, made in either the administrative or the judicial proceedings, cannot obtain attorney fees if the result the prevailing parent obtains in court is not more favorable than the offer of settlement. Thus, it covers the situation where a parent rejects an offer of settlement made before the administrative proceeding begins, loses at that proceeding or obtains less favorable relief than the parent sought, and then prevails in the subsequent judicial proceeding but obtains less favorable relief than was offered prior to the administrative proceeding.

The fact that the administrative officer is authorized to make findings on whether the relief awarded at the administrative proceeding is not more favorable than that provided in the administrative settlement does not suggest that Congress intended to authorize the judicial award of fees for administrative proceedings. Since no one claims that the administrative officer is authorized to award fees, such findings would be relevant only in a subsequent civil action brought under subsection 1415(e) by the aggrieved party.

C. In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), the Supreme Court held that a district court could award a prevailing party in a Title VII employment discrimination suit attorney fees for services rendered in prosecuting her claim in State administrative and judicial proceedings that Title VII required the claimant to exhaust before instituting a federal suit. The Court held that such an award of attorney fees was authorized under section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-5(k), which provided in pertinent part that [i]n any

action or proceeding under this subchapter [Title VII] the Court, . . . may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs.

Ms. Carey filed a district court suit alleging violations of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, and the thirteenth amendment, after she had prevailed in a State administrative proceeding that was on appeal to the State court. Upon prevailing in the State court, she filed in the federal court an application for attorney fees, most of which were for services rendered in the State administrative and judicial proceedings. Apparently treating the case as one in which the federal court suit was filed solely to obtain attorney fees for services rendered in the State proceedings, the Supreme Court held that 'sections 706(f) [the provision authorizing district court suits to enforce Title VII] and 760(k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII.' 447 U.S. at 71.

The Court stated that '[s]ince it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that section 706 (f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.' 447 U.S. at 66. The Court reasoned that the availability of a fee award for work done in State proceedings should not depend upon whether the plaintiff ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees because '[i]t would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.' Id.

Justice Stevens filed a concurring opinion which emphasize[d] that this federal litigation was commenced in order to obtain relief for respondent on the merits of her basic dispute with petitioners, and not simply to recover attorney's fees. Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees, incurred in obtaining administrative relief in either a deferral or a nondeferral State is not only doubtful but is a question that is plainly not presented by this record.

447 U.S. at 71.

Justice Stevens further stated: A quite different question would be presented if, before any federal litigation were commenced, an aggrieved party had obtained complete relief in the administrative proceedings. It is by no means clear that the statute, which merely authorizes a 'court' to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute.

447 U.S. at 72.

The Supreme Court revisited this issue in North Carolina Dept. of Transp. v. Crest Street Community Council, Inc., 479 U.S. 6 (1986). There the plaintiffs had initiated a State administrative proceeding to prevent the construction of a highway project that allegedly would violate civil rights protected by Title VI of the Civil Rights Act of 1964. The plaintiffs also moved to intervene in an existing federal action concerning the highway project and to file a civil rights complaint. Before the court ruled on those motions, the State administrative proceedings were settled and the court dismissed the plaintiffs' proposed civil rights complaint.

The plaintiffs then filed suit in the district court seeking solely an award of fees under 42 U.S.C. section 1988, which authorizes a court to award an attorney fee as part of the costs '[i]n any action or proceeding to enforce .title VI of the Civil Rights Act of 1964. . . .'

The Supreme Court held that a district court may not award attorney fees under 42 U.S.C. section 1988 in a separate action brought solely to recover fees incurred in the administrative proceedings. The Court reasoned that [t]he plain language of section 1988 suggests the answer to the question whether attorney's fees may be awarded in an independent action which is not to enforce any of the civil rights laws listed in section 1988. The section states that in the action or proceeding to enforce the civil rights laws listed . . . the court may award attorney's fees. The case before us is not, and was never, an action to enforce any of these laws. On its face, section 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws.

479 U.S. at 12 (emphasis in original).

The Court characterized Carey as a 'case in which civil rights litigation was preceded by administrative proceedings, [where] this Court has had occasion to consider whether the court in the civil rights action could award attorney's fees for time spent in the particular administrative

processes.' 479 U.S. at 11. The Court stated that 'dicta in opinions of this Court suggest that the authorization of attorney's fee awards only by a court in an action to enforce the listed civil rights laws would be anomalous [citing Carey, 447 U.S. at 65- 66],' but concluded that 'if one must ignore the plain language of a statute to avoid a possibly anomalous result, '[t]he short answer is that Congress did not write the statute that way.'' 479 U.S. at 13-14. The Court noted that 'we now believe that the paradoxical nature of this result [alluded to in Carey] may have been exaggerated. . . . It is entirely reasonable to limit the award of attorney's fees under section 1988 to those parties who, in order to obtain relief, found it necessary to file a complaint in court.' 479 U.S. at 14. Just as a suit for attorney fees is not an 'action or proceeding to enforce . . . title VI of the Civil Rights Act,' so the suit for attorney fees in the present case is not one 'brought under' subsection 1415(e). In this respect, the present case parallels Crest Street.

Crest Street also indicates that it would be 'entirely reasonable to limit the award of attorney's fees . . . to those parties who, in order to obtain relief, find it necessary to file a complaint in court.' Although that statement was made with respect to the award of attorney fees under section 1988, there is no valid reason why the principle should be any less applicable to the award of such fees under section 1415(e)(4)(B). To the extent that Carey suggests a contrary conclusion, that view no longer seems tenable in view of Crest Street. A number of cases that have held that the district court has authority under 20 U.S.C. section 1415(e)(4)(B) to award fees solely for the administrative proceedings (see part V below) have distinguished Crest Street on the ground that, unlike the EHA, Title VI does not require that claimants initially exhaust State or local administrative remedies prior to suing. See, e.g., Eggers v. Bullitt County School Dist., 854 F.2d 892, 895 (6th Cir. 1988); Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988). Crest Street, however, did not turn on whether the administrative proceeding is 'mandatory or optional, . . . integral or peripheral to the enforcement scheme,' 479 U.S. at 22 (Brennan, J., dissenting); rather the Court's decision was based on the language of the fee provision there at issue.

Finally, the statute involved in Carey, which provided for the award of attorney fees '[i]n any action or proceeding under' Title VII, was far broader than the narrowly constrained authority in section 1415(e)(4)(B) to award attorney fees only in an action or proceeding 'brought under' subsection 1415(e).

III

The 'plain language' of section 1415(e)(4)(B) 'controls its construction; at least in the absence, of 'clear evidence,' of a 'clearly expressed legislative intention to the contrary.'' Bread Political Action Comm'n v. FEC, 455 U.S. 577, 581 (1982) (citing United States v. Apfelbaum, 455 U.S. 115, 121 (1980), and Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102,108 (1980).

Since, the cases that have held that the district court has authority to award attorney fees solely for the administrative proceedings (described in part V below) have relied heavily on selected and sometimes isolated portions of the legislative history, we discuss that history in detail. As noted, the EHA originally contained no provision for the award of attorney fees, and in Smith v. Robinson, 468 U.S. 992 (1984), the Supreme Court held that the Act did not authorize such an award. In Smith the parents and child brought suit and prevailed in the district court on their claims under the EHA; there they also had based the same claims upon other statutes and the Constitution. The Court's reasoning in denying attorney fees was that none of the other statutory and constitutional claims provided in that context for an award of attorney fees and that in the EHA there was 'no indication that attorney's fees are available in an action to enforce those requirements [of the EHA].' 468 U.S. at 1006.

The provision of the HCPA that amended the EHA to authorize attorney fees was a congressional response to that ruling in Smith v. Robinson. The congressional proceedings on the HCPA are complex. Parallel bills, S. 415 and H.R. 1523, containing different language, were introduced in both the Senate and the House in early 1985, after Congress had failed to act on two earlier bills, H.R. 6014 and S. 2859, introduced in 1984.

A. THE SENATE PROCEEDINGS. S. 415, introduced by Senator Weicker, contained an attorney fee provision nearly identical to the version finally enacted. It provided:

In any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party. S. 415, 99th Cong., 1st Sess., 131 Cong. Rec. 1980 (1985).

In introducing the legislation, Senator Weicker stated on the floor that the legislation I am introducing today is a specific response to the court's

opinion in Smith versus Robinson. My amendment to Public Law 94-142 is for the limited purpose of clarifying what I believe has always been, and continues to be, the intent of Congress: that reasonable Attorneys' fees be available to parents of Handicapped children who prevail in a civil court action to enforce their child's right to education. This amendment will in no way change requirements for parents to first exhaust the available administrative procedures in attempting to resolve the disagreements. The administrative hearing procedures will continue to be the process by which the vast majority of disagreements about appropriate educational programs are resolved. In other words, civil court action will remain, as it has always been, an option of last resort. 131 Cong. Rec. 1980 (1985) (emphasis added).

S. 415 was referred to the Committee on Labor and Human Resources, of which Senator Hatch was the chairman. The Subcommittee on the Handicapped, of which Senator Weicker was the chairman, held hearings on that bill. Handicapped Children's Protection Act of 1985: Hearings on S. 415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 99th Cong., 1st Sess. (1985). Senator Weicker indicated his commitment to overturning Smith v. Robinson. Id. at 2. Senator Simon stated:

Some argue that the administrative hearings process should not be covered by this bill. Unfortunately the arguments on this ignore the fact that these hearings -- where witnesses are called and sometimes technical and medical evidence is offered -- are quasijudicial, and certainly the schools have access to counsel for these hearings. It is simply an issue of fairness to ensure that parents may also have the advice of an attorney for these hearings. Id. at 5.

An American Civil Liberties Union representative argued that, consistent with the Supreme Court's decision in Carey, the language in the bill authorized a fee award for administrative proceedings. A statement filed by the National School Boards Association, which opposed attorney fees for work done at the administrative level, expressed its concern that S. 415 amended the EHA to make 'fees available to prevailing parents at both the court and administrative level.' Id. at 64. The Council for Exceptional Children stated by letter that it 'oppose[d] the broad authority' granted through the use of the term 'any action or proceeding' and was concerned that Carey would permit parents who prevailed at the administrative proceeding to seek from the court reimbursement for fees incurred in that proceeding. Id. at 82-83.

The Committee on Labor and Human Resources, however, reported out its own bill rather than the bill the subcommittee had recommended. See S. Rep. No. 112, 99th Cong., 1st Sess. 4-11 (1985). The full committee bill had a complicated attorney fee provision that differed substantially from the one the bill originally contained. The committee bill provided that 'in any action brought under section [1415(e)], the court may, in its discretion, award a reasonable Attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs to a parent or legal representative of a Handicapped child or youth who is the prevailing party. ' Sec. 615A(a)(1)(A) (emphasis added). The committee bill further provided that whenever the parent prevailed at the administrative level and the school system appealed the administrative decision in court pursuant to section 1415(e), the parent 'shall be awarded a reasonable Attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action.' Sec. 615A(a)(1)(B). The bill also provided that if the school system used an attorney at the administrative level, it would have to pay for an attorney to represent the parent of the Handicapped child. Sec. 615A(b)(1)(C).

The committee report contained 'additional views' of twelve Senators, which stated that Senators Hatch and Weicker intended to offer a substitute version of the bill when the Senate considered the legislation. Their substitute retained the 'action or proceeding brought under this subsection' language of the original Weicker bill, but substituted the phrase 'a reasonable attorney's fee in addition to the costs' for the original 'a reasonable attorney's fee as part of the costs' language. The additional views statement explained: The Committee believes that the substitute bill provides fee awards to handicapped children on a basis similar to other fee shifting statutes when securing the rights guaranteed to them by the EHA.

* * * *

Section 2 of the bill amends section 615(e)(4) of the EHA to permit a court, in its discretion, to award reasonable Attorney's fees to parents or legal representatives of a Handicapped child or youth who is the prevailing party in any action or proceeding brought under this subsection.

* * * *

The committee also intends that section 2 should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964 which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings under those statutes. See

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), (compare Webb v. Board of Education for Dyer County, 53 U.S.L.W. 4473 (U.S. April 17, 1985) in which the court declined to award fees for work done at the administrative level because the statute under which the suit was brought did not require the exhaustion of administrative remedies prior to going to court).

The committee intends that S. 415 will allow the Court, but not the hearing officer, to award fees for time spent by counsel in mandatory EHA administrative proceedings. This is consistent with the committee's position that handicapped children should be provided fee awards on a basis similar to other fee shifting statutes when securing the rights guaranteed to them by the EHA. S. Rep. No. 112, 99th Cong., 1st Sess. 13-14 reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1803-04.

The Senate accepted and passed the Hatch and Weicker substitute bill. 131 Cong. Rec. 21389-93 (1985). In the floor debate, Senator Weicker stated: The bill reverses the Supreme Court's Smith versus Robinson decision of July 5, 1984. In that decision, the Court ruled, contrary toe the original intent of Congress, that Public Law 94-142 does not allow the award of attorney's fees to parents who, after exhausting administrative procedures, prevail in a civil court action. . . .

The purpose of S. 415 is simple -- to overturn the Smith [v]ersus Robinson decision and thereby to clarify congressional intent regarding these matters.

* * * *

Allowing courts to award attorney's fees to prevailing plaintiffs is not an unusual congressional remedy. In fact, . . . Congress has already enacted more [than] 130 fee shifting statutes which provide for the award of attorneys fees to parties who prevail in court to obtain what is guaranteed to them by law.

* * * *

Mr. President, I urge my colleagues to support this important piece of legislation which will restore to parents of Handicapped children the right to be awarded Attorney fees and other reasonable expenses when they must go to court to secure the educational rights promised to them by Congress. 131 Cong. Rec. 21389-90 (emphasis added).

Senator Stafford stated:

This bill amends Public Law 94-142, the Education for Handicapped Children Act, to make reasonable Attorney's fees available to parents who prevail in court actions filed under 94-142.

* * * *

Critics of S. 415 are fearful that the availability of attorney's fees award to prevailing parents will increase litigation. It is my belief that the opposite situation will occur. State and local education agencies will be more inclined to work out effective compromises with parents before court action becomes necessary.

Parent must have every opportunity to participate with local school personnel to develop programs for their Handicapped children if 94-142 is to provide the free and appropriate education that it promised. That includes making reasonable legal fees available if the services of an Attorney are necessary. Id. at 21390 (emphasis added).

Senator Kennedy stated:

[T]his legislation will clarify congressional intent by authorizing the award of attorneys fees at the discretion of the judge to prevailing parents in Public Law 94-142 cases. . . .

* * * *

The basic purpose of this legislation and its primary intent states that handicapped children and their parents or legal guardians should be able to participate in the due process system and have access to the full range of remedies to protect their educational rights on an equal par with the school districts. Id. at 21391.

Senator Kerry stated:

The bill is designed to ensure that all parents or legal guardians of handicapped children are able to fully access the available remedies to protect their handicapped children's educational rights.

* * * *

S. 415 is designed to reinforce the rights to education for all handicapped children provided in Public Law 94-142 the Education of the Handicapped Act, including their rights to access the courts when education is being denied to them. Id. at 21391-92.

Senator Simon, who spoke just before the Senate voted, stated: I would like to discuss two major aspects of this bill: the inclusion of the right to reimbursement for fees incurred during the administrative process; and the requirement that administrative proceedings be exhausted prior to court action.

The language of S. 415, which permits the award of a reasonable attorney fee in any action or proceeding brought under this subpart, is identical to the language of title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in New York Gaslight Club v. Carey (447 U.S. 54) (1980). The Court stated:

Congress' use of the broadly inclusive disjunctive phrase 'action or proceeding' indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

The Court's decision in Gaslight further established the right under title VII to sue solely to obtain an award of attorney's fees for legal work done in State and local proceedings. As the Court stated:

It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

Under the Court's reasoning, since the Education of the Handicapped Act, like title VII, requires parents to exhaust administrative remedies before seeking judicial relief, prevailing parties under the Education of the Handicapped Act must also be entitled to recover legal fees for the costs of mandatory proceedings. 131 Cong. Rec. 21392 (1985).

B. THE HOUSE PROCEEDINGS. Representalliams, Chairman of the House Subcommittee on Select Education, introduced H.R. 1523, which provided: In any action brought under this subsection, the court, in its discretion, may award reasonable Attorney's fees and other expenses as part of the costs to the parents or guardian of a Handicapped child or youth who is the prevailing party. H.R. 1523, 99th Cong., 2d Sess., 131 Cong. Rec. 5046 (1985).

This bill was referred to the House Committee on Education and Labor and considered by Representative Williams' subcommittee. The subcommittee reponed a substitute bill, which provided that the parent who

was the prevailing party in the civil action also could obtain attorney fees incurred in the administrative proceedings in three specific circumstances.

In markup sessions of the House Committee on Education and Labor, held after the Senate had passed S. 415, Representative Williams offered an amendment (cosponsored by Representative Biaggi), which he described as identical to the Senate provision, which would 'provide[] that parents who prevail in an action or proceeding in which they claim the denial of a free, appropriate public education under P.L. 94-142 may recover attorneys' fees at the court's discretion.' House Committee on Education and Labor Markup of H.R. 1523, 124 (Sept. 11, 1985) (transcripts available at the Office of the Clerk, U.S. House of Representatives) [hereinafter Markup]. Representative Bartlett opposed the amendment because it 'allow[ed] for attorneys' fees at the administrative level in virtually all circumstances, without the case ever going to court.' Markup at 132. Representative Bartlett offered an amendment, which the committee rejected, under which attorney fees incurred in 'any administrative proceeding may not be awarded under this subparagraph unless the parents or guardian prevail on a substantive claim in the civil action.' He explained that the amendment 'would simply allow for attorney's fees at the administrative level only when the parents prevail in court.' House Committee on Education and Labor Markup of H.R. 1523, 27 (Sept. 19, 1985) (transcripts available at the Office of the Clerk, U.S. House of Representatives).

Representative Jeffords also opposed the Williams-Biaggi amendment. He favored the bill reported by the subcommittee, stating, 'I think the subcommittee did an excellent job doing that [outlining the circumstances for which fees incurred at the administrative level would be awarded]. I understand that subsequent to that, for whatever reasons, there was a bill passed in the Senate which was much more generous, in a sense, to the Handicapped individuals, and therefore the subcommittee decided to make the House bill equally more generous in that sense on Attorneys' fees.' Markup at 171-72.

Representative Jeffords offered an amendment similar to the subcommittee provision. Representative Biaggi opposed the amendment, stating that '[w]hat the gentleman [Representative Jeffords] is trying to do is go back to where we were in the subcommittee. Since that time the Senate has moved and reported a bill out. The administration supports what came out of the Senate, and we are just going along with what the Senate has.' Markup at 174.

The House Committee reported an amended version of H.R. 1523, that incorporated the Williams-Biaggi amendment by adding the word 'proceeding' to the fee provision of H.R. 1523. The committee report stated that 'proceeding ' referred to a due process hearing or a State level review. The report stated: Section 2 of the bill amends section 615(e)(4) of EHA to permit a court, in its discretion, to award reasonable attorneys' fees, . . . to the parents . . . who is the prevailing party in an action or proceeding (a due process hearing or a state level review) brought under Part B of EHA.

The 'action or proceeding' language in section 2 of the bill is identical to the language in title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in New York Gaslight Club v. Carey, 447 U.S. 54 (1980). In Gaslight, the Court held that the use of the phrase 'action or proceeding ' indicates an intent to sthe losing party to an award of attorneys' fees, expenses and costs incurred in court. The Court's decision also established a similar right under title VII to obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even where no lawsuit is filed.

* * * *

Further, if a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees, costs, and expenses incurred in such administrative proceeding. Usually, the amount of such fees, costs, and expenses will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs, and expenses. H.R. Rep. No. 296, 99th Cong., 1st Sess. 5 (1985).

The bill the House committee reported also included a 'sunset provision' under which judicial authority to award attorney fees to parents who prevailed in administrative proceedings would end four years after enactment. It accomplished this by providing that there would be substituted for 'action or proceeding' the words 'civil action,' and that this provision would be effective in four years. As Representative Williams, the floor manager, explained on the floor of the House:

[T]he legislation contains a sunset provision under which a court's authority to award fees to parents who prevail in administrative proceedings terminates 4 years after the date of the enactment of this legislation. . . . Thus, after 4 years, unless Congress passes additional

legislation, a court's authority to award fees will be limited to civil actions in State or Federal courts in which parents prevail. 131 Cong. Rec. 31370 (1985).

Representative Williams also explained that the bill amends part B of EHA to provide that a parent or guardian of a Handicapped child who prevails against a school district or State educational agency in a civil action in Federal or State court, or an administrative proceeding such as a due process hearing or State appeal, may be awarded reasonable attorney's fees, costs and expenses by the court. Id.

Representative Bartlett, who considered the provision of the bill providing for attorney fees at the administrative level to be 'a serious flaw, ' recognized that the bill so provided:

Under H.R. 1523, for the first time, parents who retain an attorney for work conducted at the administrative hearing level will be able to recover fees if they prevail at the hearing, even if the issue does not go to court. Id. at 31371.

In response to a question by Representative Bartlett, Representative Williams explained the meaning of the terms 'action' and 'proceeding': The term 'action' is intended to include a civil action filed in a State or Federal court. The term 'proceeding' is limited to the due process hearing that parents are required to exhaust under 615(b)(2) and the State appeal under section 615(c). Id. at 31373.

Representative Jeffords, the ranking member of the Education and Labor Committee, expressed his concern that '[b]y providing for attorneys' fees at the administrative level, . . . we will be reversing our original intent and interfering with a procedure that is working,' but acknowledged that '[o]ur debate on the issue though, has been precluded somewhat by the action taken by the other body. Instead, concerns regarding the wisdom of providing for attorneys' fees at the administrative proceedings level have been partially addressed in H.R. 1523 by the inclusion of a sunset provision.' 131 Cong. Rec. 31376.

Representative Miller supported the provision for fees in both administrative and judicial proceedings:

In those instances where parents feel compelled to pursue a formal hearing or court action to attain free appropriate education for their child, providing reimbursement for needed legal assistance is critical to assure fair and equal access to this right. Id.

Representative Johnson expressed concern about the provision for fees 'to be awarded at the administrative level, without limitation, without going to court.' 131 Cong. Rec. 31377. Representative Williams responded:

Mr. Speaker, the gentlewoman raises a matter which has been of great contention. I will tell my colleagues that it has been considered, that the bill has been accepted overwhelmingly, and the administrative fee language in this bill is identical to that which has been accepted in the Senate. Id.

C. THE CONFERENCE BILL AND ITS ENACTMENT. The bills went to conference, which reported a bill that contained the language in 'any action or proceeding brought under this subsection.' The conferees changed the wording of the Senate bill that provided fees 'in addition to the costs' to a bill providing for fees 'as part of the costs.' The conferees explained: 'The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.' H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808. The conference bill did not include the sunset provision in the House version. The conference report stated with respect to this action only that: 7. The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation. The House recedes. H.R. Conf. Rep. No. 687, at 7.

The conference bill added a number of provisions, not in the Senate or House bills, that were designed to avoid excessive fees. 20 U.S.C. section 1415(e)(4)(D), (E), (F), and (G). Those provisions reduce the amount of attorney fees that would otherwise be available in 'actions or proceedings under the subsection.' H.R. Conf. Rep. No. 687, at 6. In the Senate debate on the conference report, Senator Weicker, a conference manager, stated:

The Handicapped Children's Protection Act states explicitly what is implicit in the Education of the Handicapped Act regarding the civil right of Handicapped children to an education. By allowing the courts to award Attorneys' fees to prevailing parents or guardians, Handicapped children are protected against discrimination in the same manner as are other vulnerable groups. What we do here today is to make the Education of the Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of Attorneys' fees to parties who prevail in

court to obtain what is guaranteed to them by law. 132 Cong. Rec. 16823 (1986).

Senator Hatch, the chairman of the Senate conferees, stated: The agreement we are now considering is a compromise which I feel accomplishes two major objectives. First, it provides for the award of reasonable Attorneys' fees to prevailing parents in an Education of the Handicapped Act action or proceeding. Id. at 16825.

In the House debate on the Conference Report, Representative Williams, a conference manager, stated:

The bill clarifies the intent of Congress that Handicapped children and their parents have available to them the full range of remedies necessary . . . includ[ing] the right to reimbursement of reasonable Attorneys' fees in actions and proceedings in which they are declared the prevailing party. 132 Cong. Rec. 17608 (1986). He stated that 'the conference agreement contains most of the key provisions in the House bill,' and described the conference agreement as follows:

First, with slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs to parents who prevail in any action or proceeding. Under the conference agreement, the Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that the court in its discretion may award reasonable attorneys' fees to the prevailing parents as part of the costs of the action or proceeding.

Id. Representative Williams then explained the rejection of the sunset provision:

The conference agreement does not include the 'sunset provision' which was included in the House bill. Under this provision, the authority of the court to award fees to parents prevailing at administrative hearings would be repealed in 4 years. This provision was of particular concern to the House Republican conferees. On three separate occasions, all conferees from the other body rejected requests to include the 'sunset' provision in the conference agreement. Id.

Representatives Bartlett and Jeffords expressed disappointment that the sunset provision was not included. Id. at 17608-09, 17610- 11. Representative Hawkins, the chairman of the House conferees committee, stated that the statute only allows the award of attorneys' fees to prevailing parents, whether plaintiff or defendant in an action or proceeding. (Compare 42 U.S.C. section 1988).

Second, under this bill, there is language making the Supreme Court's ruling M [a]rek v. Chesny, 87 L.Ed. 2d 1 (1985) applicable to both court actions and administrative proceedings. . . . Third, the conference agreement provides fees when a parent prevails in an action or proceeding. Id. at 17611.

* * * * *

We draw the following conclusions from the legislative history:

1. The House intended to authorize the district courts to award attorney fees for services rendered in the administrative proceedings, in a suit brought solely for that purpose, and believed that the language in the Senate bill -- 'in any action or proceeding brought under this subsection' -- accomplished that result. This is shown by (a) the repeated statements by Representative Williams, the chairman of the subcommittee that considered the bill, and by opponents of the provision that that was its effect; (b) the House committee's addition of the word 'proceeding' to the House bill, which was done in elief that the change would make the attorney fee provision applicable to administrative proceedings; (c) the statement in the House Report that the word 'proceeding' refers to administrative proceedings and that, consistent with the Supreme Court's decision in Carey, parents who prevail on the merits at an administrative proceeding may bring a separate action in court for attorney fees; and (d) the 'sunset provision' -- which would have repealed the word 'proceeding' after four years -- which was included as a concession to House members who opposed the broad authority to award fees for work done at the administrative level.

2. Although some members of the Senate intended to authorize the district court to award such attorney fees and believed that the Senate bill had that effect, other Senators had a contrary view. No clear expression of the Senate's intention can be discerned.

The only Senator who expressly stated that the Senate provision covered fees in administrative proceedingenator Simon who, although a member of the Committee on Labor and Human Resources, was not in charge of the bill. Senator Weicker, who introduced the bill and was a leader in its development and enactment, stated on a number of occasions, including a statement during debate on the conference bill, that the bill provided for attorney fees to parents who prevailed in court proceedings. Senator Stafford made a similar explicit statement. Many of the other statements made during Senate consideration of the legislation merely

repeated the statutory language without focusing on precisely what it authorized.

The portion of the additional views statement in the Senate Report citing the Supreme Court's decisions in Carey and Webb is ambiguous. Webb did not involve a suit brought solely to obtain fee's for work done in State administrative proceedings. The petitioner there was a school teacher who, although unsuccessful in challenging his dismissal in State tenure rights hearings, finally had prevailed on a section 1983 claim in district court. The district court awarded attorney fees for time spent in the judicial proceeding but denied fees for time spent in proceedings before the local school board. In citing Carey (involving mandatory State administrative proceedings under Title VII) and Webb (involving an 'optional' State proceeding not brought to enforce the civil rights laws), the additional views statement may have been suggesting only that parents who prevail in an EHA judicial action also will be awarded fees for work done at the administrative level.

3. The brief statement in the conference report about the conferees' rejection of the sunset provision in the House bill, which the report described as terminating 'the court's authority to award fees at the administrative level, ' does not establish that the conferees believed the bill they recommended granted that authority. One possible explanation of the conferees' action is that the Senate conferees intended to adopt the authority the House bill conferred, but did not want to limit it to four years. An equally plausible explanation, however, is that the Senate conferees did not believe the conference bill contained that authority, so that there was no reason to terminate it after that time.

We cannot say that, viewed in its entirety, the legislative history reflects 'a clearly expressed legislative intention to the contrary' of 'the language of the statute itself' (Consumer Product Safety Comm'n, 447 U.S. at 108) that would justify the departure from the statutory language. Such a departure would be required to hold that the Act authorizes the award of attorney fees for services rendered in the administrative proceeding.

D. The Secretary of Education's Interpretation. In the interest of completeness, we allude to one other item in the history of the legislation, the significance of which is doubtful.

During the House consideration of the bill, Representative Bartlett requested the Secretary of Education to clarify the Administration's position on S. 415 as the Senate had passed it. Representative Bartlett stated that the Administration's prior expression of general support for S.

415 'is being construed to mean support for the 'action or proceeding' provision,' which Bartlett stated 'would allow the court to award fees to prevailing parents for both court costs and administrative hearing costs, even before the parent prevails in court.' Letter from Representative Steve Bartlett to Secretary William J. Bennett (Sept. 5, 1985) (reproduced in Addendum to Appellees' Brief at A-8-9). The Secretary responded by letter that the Department's understanding was that under S. 415 '[t]he court could also award fees for administrative proceedings where no court case resulted so long as the parents prevailed in those proceedings.' Letter from Secretary William J. Bennett to Representative Steve Bartlett (Sept. 10, 1985) (reproduced in Addendum to Appellees' Brief at A-10-11).

After Congress passed the bill, the Secretary recommended in a letter to the Director of the Office of Management and Budget that the President sign the bill. The Secretary stated that his Department 'support[s] the award of attorney's fees to prevailing parents in judicial proceedings brought under the EHA,' but noted that '[o]ur major remaining objection to the bill is that it would authorize the award of attorney's fees for work done in administrative proceedings.' Letter from Secretary William J. Bennett to Director James C. Miller III (July 25, 1986) (reproduced in Addendum to Appellees' Brief at A-16- 18).

These statements by the Secretary do not involve the traditional situation where a court gives considerable weight to the interpretation of a statute by the agency charged with its enforcement. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965). Although the Secretary has an important role under the statute in administering the federal grants to the States and also performs certain oversight functions, see, e.g., 20 U.S.C. Section 1417-1418 (Supp. 1988), the conduct of the administrative proceedings is left to the State and local educational agencies. The Secretary has nothing to do with the award of attorney fees.

In these circumstances, the Secretary's view that the statute authorized the award of attorney fees for services in the administrative proceedings in which the parent or child prevails, is entitled to little, if any, weight in determining whether a suit seeking only such fees is an 'action or proceeding brought under' subsection 1415(e).

IV

It has been suggested that policy considerations militate against our conclusion. The argument is that it would be anomalous and would make little sense if parties who prevailed at the administrative proceeding were denied attorney fees, whereas if they lost at those proceedings and then prevailed in court they would receive fees.

The argument is undermined by Crest Street, which concluded that it was 'entirely reasonable to limit the award of Attorney's fees under Section 1988 [and by the same reasoning under Section 1415(e)(4)(B)] to those parties who, in order to obtain relief, found it necessary to file a complaint in court.' 479 U.S. at 14. Indeed, there are indications in the legislative history of this statute that the Senate may have believed that most of the disputes under the Act over the provision of a proper education for Handicapped children would be resolved informally at the administrative level and that resort to judicial proceed ins would be relatively infrequent. See, e.g., 131 Cong. Rec. 21390 (1985) (statement of Senator Stafford). This belief could have led Congress to limit the award of Attorney fees to parties who prevail on the merits in court actions.

In any event, our task is to apply the statute as written and not to rewrite it to achieve an objective that we deem desirable and fair. The alleged anomaly of denying attorney fees for administrative proceedings would not justify a departure from what we view as the correct reading of the language Congress used in providing for the award of attorney fees under this statute.

V

We reach our conclusion with considerable reluctance and some diffidence because of the numerous judicial decisions that have gone the other way. The Fifth and Sixth Circuits have reached the contrary conclusion, as did the Second Circuit in dictum. Duane v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988); Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988); see Counsel v. Dow, 849 F.2d 731, 740-41 n.9 (2d Cir. 1988) (dictum), cert. denied, 109 S. Ct. 391 (1988). So have the overwhelming majority of district courts that have considered the precise issue. See Williams v. Boston School Comm., No. 88-571-C (D. Mass. Mar. 14, 1989); Schroeder v. San Mateo County, 1988-89 EHLR Dec. 441:244 (N.D. Cal.); Burr v. Ambach, 683 F. Supp. 46 (S.D.N.Y. 1988); Chang v. Board of Educ., 685 F. Supp. 96 (D.N.J. 1988); Dow v.

Watertown School Comm., 701 F. Supp. 264 (D. Mass. 1988); Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988); Robert D. v. Sobel, 688 F. Supp. 861 (S.D.N.Y. 1988); Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988); Burpee v. Manchester School Dist., 661 F. Supp. 731 (D.N.H. 1987); Keay v. Bismarck R-V School Dist., 1986-87 E.H.L.R. Dec. 558:317 (E.D. Mo. 1987); Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987); Mathern v. Campbell County Children's Center, 674 F. Supp. 816 (D. Wyo. 1987); Michael F. v. Cambridge School Dept., No. 86-2532-C (D. Mass. Mar. 5, 1987); Prescott v. Palos Verdes Peninsula Unified School Dist., 659 F. Supp. 921 (C.D. Cal. 1987); School Bd. of Prince William County v. Malone, 662 F. Supp. 999 (E.D. Va. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987). At least two districts, however, have reached the conclusion we reach. Mc Corniack v. Burlingame Elementary School Dist., No. C 88-0141 JPV (N.D. Ga. June 27, 1988); Rollison v. Biggs, 660 F. Supp. 875 (D. Del. 1987).

None of the opinions authorizing the award of attorney fees, for administrative proceedings provides the detailed analysis of the statutory language and the legislative history we have made. That analysis convinces us that Congress did not authorize the district court to award attorney fees for services in the administrative proceeding, in a suit brought solely to obtain such fees.

CONCLUSION

The judgment of the district court awarding attorney fees and costs to the appellees is reversed.

FOOTNOTE TO THE OPINION

FN* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. section 291(a).

DISSENT OF CIRCUIT JUDGE EDWARDS

EDWARDS, CIRCUIT JUDGE, dissenting:

The simple issue in this case is whether a court has authority to award Attorneys' fees to a person who has prevailed in an administrative proceeding under the Education of the Handicapped Act ('EHA'), as amended in 1986 by the Handicapped Children's Protection Act ('HCPA'). This is not a novel question, nor is it an issue of first impression, for it has been the subject of litigation in numerous actions in federal court. Every circuit court that has considered this issue has concluded that EHA provides for an award of Attorneys' fees to parents who prevail in administrative proceedings in a suit brought to obtain those fees; and an overwhelming number of district courts have held the same. [FN2] I can see no reason for this court to conclude otherwise.

The majority offers an exhaustive examination of the case law and legislation bearing on the matter before us. But, in my view, the majority opinion supports a result just the opposite from the one it reaches. Most of the evidence cited by the majority shows that, in enacting HCPA, Congress clearly intended to provide attorneys' fees for those individuals who prevail in administrative proceedings. Because I believe the result reached by the majority is inconsistent with the language of the statute, its legislative history and the view held by an overwhelming majority of the courts that have addressed this question, I dissent.

I.

To begin with, the plain language of the statute provides that a court may award attorneys' fees to a party who has prevailed in either a judicial action or an administrative proceeding. Section 1415(e)(4)(B) expressly states that In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable Attorneys' fees as a part of the cost to the parents or guardian of a Handicapped child or youth who is the prevailing party.

20 U.S.C. section 1415(e)(4)(B) (emphasis added). There is no way that this provision can be read other than to allow for an award of fees to parents who prevail in administrative proceedings in a suit brought to obtain those fees.

The majority opinion simply ignores the plain language. Instead, it asserts that a party who prevails in a proceeding cannot seek attorneys' fees under the 'subsection' because the party is not 'aggrieved.' Majority

Opinion ('Maj. Op.') at 6 (referring to subsection 1415(e)(2)). [FN3] This argument completely begs the question. What this court is deciding is precisely whether a party who has secured all but attorneys' fees in a proceeding is an 'aggrieved' party entitled to bring suit for attorneys' fees.

The majority opinion similarly glosses over the import of section 1415(e)(4)(D), which also discusses attorneys' fees for prevailing parties 'in an action or proceeding.' This section sets the parameters for such awards: it bars the award of attorneys' fees when either 'the court or administrative officer' finds that the relief finally obtained by a prevailing party is not more favorable than an earlier offer of settlement. See 20 U.S.C. section 1415(e)(4)(D) (emphasis added). [FN4] Under this provision, an administrative officer has the authority to make findings relevant to an award of attorneys' fees. Thus, a party may file suit in court as an 'aggrieved party' when an administrative officer's determinations are unfavorable with respect to findings necessary to support a claim for fees. The majority inexplicably ignores the statutory role of the administrative officer and the appealability of his or her adverse findings.

Furthermore, and more importantly, there is absolutely nothing in the language of section 1415(e)(4)(D) to support the majority's view that the statute 'merely provides that a parent who rejected an offer of settlement, made in either the administrative or the judicial proceedings, cannot obtain attorney fees if the result the prevailing party obtains in court is not more favorable than the offer of settlement.' Maj. Op. at 10 (emphasis added). As the highlighted portion of the quoted material shows, the majority opinion does nothing more than construe the statute in a way to achieve the result sought; but the language of section 1415(e)(4)(D) does not say what the majority says. What the statute does say is that an award of fees is barred only if 'the court or the administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.' 'Relief finally obtained' can be the relief awarded in the administrative proceeding. Thus, if a parent rejects an offer of settlement because it does not include fees, and then obtains all of the relief sought except fees at the administrative proceeding, that parent is not barred from an award of fees under section 1415(e)(4)(D); and the administrative officer would be authorized to find that the relief awarded at the administrative proceeding 'is not more favorable to the parents than the offer of settlement.' And, as the majority correctly recognizes, 'such findings would be relevant ONLY in a subsequent civil action brought under subsection 1415(e) by the aggriped

party' (i.e., the parents who have failed to obtain fees). See Maj. Op. at 10 (emphasis added).

II.

Moreover, to the extent that there is any ambiguity in the meaning of the statute, it is cured by the legislative history, which makes clear that Congress provided an action for attorneys' fees. The majority opinion itself concludes that '[t]he House intended to authorize the district courts to award attorneys' fees for services rendered in the administrative proceedings, in a suit brought solely for that purpose, and believed that the language in the Senate bill -- 'in any action or proceeding brought under this subsection' -accomplished this result.' Maj. Op. at 30. The majority cannot point to anything in the Senate's legislative history that contradicts this understanding of the provision.

The majority only asserts that it can discern 'no clear expression of the Senate's intention.' Id. at 31. On the one hand, it acknowledges that Senator Simon saw the provision as establishing the right to sue for attorneys' fees; on the other hand, it finds somehow troubling the statements by Senator Weicker allowing 'for the award of attorneys' fees to parties who prevail in court to obtain what is guaranteed to them by law.' 132 Cong. Rec. 16823 (1986) (statement of Sen. Weicker) (quoted in Maj. Op. at 28-29).

Senator Weicker's statements, however, in no way contradict Senator Simon's or the House's understanding of the attorneys' fees provision; and his statements in no way negate the view that the statute provides for attorneys' fees for parents who prevail in administrative proceedings. Indeed, this point is confirmed by the Amicus Brief submitted to this court. This brief, signed by various members of the Senate and House, who are identified as the 'chief sponsors and co-sponsors of the legislation, chairmen and ranking minority members of the committees and subcommittees with jurisdiction, and conferees, ' says that amici believe that after two years of deliberation on exactly the issue before this Court, there can be no doubt that the effect, meaning, and intent of Congress' action was to provide for attorneys' fees for parents who prevail in administrative proceedings.

Brief Amicus Curiae on Behalf of Senators Tom Harkin, Edward M. Kennedy, John F. Kerry, Paul Simon, Robert T. Stafford, Lowell P. Weicker, Jr., and Representatives Tony Coelho, Augustus F. Hawkins, James M. Jeffords, Major R. Owens, Pat Williams at 1. In short, there is

no basis for the majority's assertion that the House and the Senate were not in agreement on the attorneys' fees provision that both houses enacted into law.

Finally, the most convincing evidence of legislative intent is the HCPA conference bill and its enactment. The House version of the bill that went to conference included a provision saying that the authority of the court to award fees to parents prevailing at administrative hearings would be repealed in four years. 131 Cong. Rec. 31370 (1985) (statement of Rep. Williams). This sunset provision was added to appease Representatives who opposed attorneys' fees at the administrative level. 131 CONG. REC. 31376 (1985) (statement of Rep. Jeffords). However, the conference bill deleted the sunset provision, thus removing any limitation on the authority of a court to award fees to parties prevailing in an administrative proceeding. H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, at 7.

The majority opinion concedes that 'one possible explanation' of the conferees' action in deleting the sunset provision is that the Senate conferees intended to adopt the authority the bill conferred, but did not want to limit it to four years. Maj. Op. at 32. I submit that this is the only possible explanation. The conference report itself expressly acknowledges 'the courts' authority to award fees at the administrative level,' and then says that the conference bill removes the sunset provision that would have limited this authority. H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 5, at 7 (emphasis added). The import of the conferees' action is thus absolutely clear,

The majority opinion argues that 'an equally plausible explanation' of the conferees' action is that the Senate conferees did not believe the conference bill contained any authority for the award of fees at the administrative level, so that there was no reason to terminate it after four years. Maj. Op. ate 32. But this explanation is completely at odds with what the conference report itself says. The report says that '[t]he House amendment, but not the senate bill,' would limit 'the court's authority to award fees at the administrative level' after four years. H.R. CONF. REP. No. 687, 99th Cong., 2d Sess. 5, at 7 (emphasis added). If the Senate conferees truly believed that the bill contained no authority for the award of fees at the administrative level, as the majority suggests, then the conference report makes no sense as written. The conference report can only be read to indicate that the conferees agreed to RETAIN the court's authority to award fees at the administrative level without any limitation through a sunset provision.

III.

The statutory language and the legislative history of EHA, as amended by HCPA, show that Congress provided for attorneys fees for parents who prevail in administrative proceedings. I dissent because the result reached in the majority opinion is wholly at odds with this congressional intent.

FOOTNOTES TO THE DISSENT OF CIRCUIT JUDGE EDWARDS

FN1 See Duane v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988); Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988); Counsel v. Dow, 849 F.2d 731, 740-41 n.9 (2d Cir.) (dictum), cert denied, 109 S. Ct. 391 (1988).

FN2 See, e.g., Michael F. v. Cambridge School Dept., No. 86-2532-C, slip op. (D. Mass. Mar. 5, 1987); Williams v. Boston School Comm., No. 88-571-C, slip op. (D. Mass. Mar. 14, 1989); Doe v. Watertown School Comm., 701 F. Supp. 264 (D. Mass. 1988) ; Burr v. Ambach, 683 F. Supp. 46 (S.D.N.Y. 1988); Chang v. Board of Educ., 685 F. Supp. 96 (D.N.J. 1988) ; Neisz v. Portland Pub. School Dist., 684 F. Supp. 1530 (D. Or. 1988); Dodds v. Simpson, 676 F. Supp. 1045 (D. Or. 1987); Robert D. v. Sobel, 688 F. Supp. 861 (S.D.N.Y. 1988); Turton v. Crisp County School Dist., 688 F. Supp. 1535 (M.D. Ga. 1988); Burpee v. Manchester School Dist., 661 F. Supp. 731 (D.N.H. 1987) Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987); Mathern v. Campbell County Children's Center, 674 F Supp. 816 (D. Wyo. 1987); Prescott v. Palos Verdes Peninsula Unified School Dist., 659 F. Supp. 921 (CA.D. Cal. 1987); School Bd. of Prince William County v. Malone, 662 F. Supp. 999 (E.D. Va. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987). But see McCormack v. Burlingame Elementary School Dist., No. C-88-0141 JPY, slip op. (N.D. Cal. June 27, 1988); Rollinson v. Biggs, 660 F. Supp. 875 (D. Del. 1987).

FN3 Section 1415(e)(2) states that '[a]ny party aggrieved by the findings and decision made under subsection (b) of this section . . . and any party aggrieved by the findings and decision under subsection (c) of this section [dealing with administrative proceedings by State educational agencies], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section. . . .'

FN4 Section 1415(e)(4)(D) bars an award of attorneys' fees in any action or proceeding under this subsection for services performed

subsequent to the time of a written offer of settlement to a parent or guardian, if --

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

C.A.D.C., 1989.
Moore, et al. v. District of Columbia, et al. --- F.2d ----, 1989 WL 65280 (D.C.Cir.), 58 U.S.L.W. 2007

SHELLY C., b/n/f Mr. and Mrs. Shelbie C., Plaintiff-Appellee,
v.
VENUS INDEPENDENT SCHOOL DISTRICT, et al,
Defendants-Appellants.

No. 89-1056
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
Aug. 2, 1989.

Handicapped child sued school district to recover attorney fees and costs following settlement of dispute over individualized education program. The United States District Court for the Northern District of Texas at Dallas, Samuel Ray Cummings, J., granted child's motion for summary judgment on the merits. On appeal, the Court of Appeals, Duhe, Circuit Judge, held that: (1) genuine issues of material fact precluded summary judgment, and (2) attorney fees were recoverable under Handicapped Children's Protection Act when settlement was reached prior to due process hearing.

Reversed and remanded. [1] 170AK2491.5 FEDERAL CIVIL PROCEDURE K. Civil rights cases in general. C.A.5 (Tex.) 1989.

Genuine issues of material fact, as to whether attorney fees urged by plaintiff in action under Handicapped Children's Protection Act were reasonable in light of prevailing fees in community, whether plaintiff's attorneys unnecessarily protracted proceedings, and whether defendants made reasonable settlement offer more than ten days prior to due process hearing, precluded summary judgment for fees and costs. Education of Handicapped Act, ss 601-685, 615(e)(4)(B), as amended, 20 U.S.C.A. ss 1400-1485, 1415(e)(4)(B).

SHELLY C. by Shelbie C. v. VENUS Independent School Dist. 878 F.2d 862, 54 Ed.Law Rep. 1126 [2] 345K155.5(5) SCHOOLS K. Judgment and relief; damages, injunction, and costs. C.A.5 (Tex.) 1989.

Attorney fees may be awarded under Handicapped Children's Protection Act when settlement is reached prior to due process hearing. Education of Handicapped Act, s 615(e)(4)(B), as amended, 20 U.S.C.A. s 1415(e)(4)(B). Shelly C. by Shelbie C. v. Venus Independent School Dist. 878 F.2d 862, 54 Ed.Law Rep. 1126

Martha C. Wright, Wright & Assoc., Grand Prairie, Tex., for defendants-appellants.

Mark S. Partin, Advocacy, Inc., Austin, Tex., for plaintiffappellee.
Appeal from the United States District Court For the Northern District of Texas.

Before REAVLEY, JONES and DUHE, Circuit Judges.
878 F.2d 862
DUHE, Circuit Judge:

SHELLY C. is a handicapped child enrolled in the VENUS Independent School District ("VENUS ISD"). Pursuant to the Handicapped Children's Protection Act (the "HCPA"), 20 U.S.C. ss 1400-1485, her parents appealed her Individualized Education Program by filing a request for a due process hearing before a Special Education Hearing Officer against the VENUS ISD and two other parties (the "appellants"). The parties settled their dispute before the due process hearing was held.

One week after the settlement, Shelly C. sued the appellants to recover attorneys' fees and costs pursuant to 20 U.S.C. s 1415(e)(4)(B) and moved for summary judgment on the merits. The district court granted Shelly C.'s summary judgment motion, awarding $30,533.62 in attorneys' fees. The appellants appeal from that ruling, and also contend that the district court erred in denying their motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and for summary judgment.

I.

The law on summary judgment is succinctly stated in Williams v. Adams, 836 F.2d 958 (5th Cir.1988):

A court may only grant a motion for summary judgment when "there is no issue of material fact, and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party also has the burden of showing that these conditions have been satisfied. Thomas v. Harris County, 784 F.2d 648, 651 (5th Cir.1986) (per curiam) Furthermore, in reviewing a motion for summary judgment, on appeal we must view the evidence in the light most favorable to the party resisting the motion, as the district court must do in the first instance. Simon v. United States, 711 F.2d 740, 743 (5th Cir.1983). Id. at 960.

We will affirm a grant of summary judgment "only when the moving party has established his rights to the judgment with such clarity that the non-moving party cannot recover ... under any discernible circumstances." Clark v. Tarrant County, 798 F.2d 736, 746 (5th Cir.1986) (citation

omitted). In making this determination we must look to the full record, including the pleadings and affidavits. See Trevino v. Celanese Corp., 701 F.2d 397, 406-07 (5th Cir.1983).

[1] After a review of the record, we find that summary judgment was inappropriate. In opposition to Shelly C.'s summary judgment motion, the appellants submitted affidavits supporting their contention that the fee urged by the plaintiff is unreasonable in light of the prevailing fees in the community and that Shelly C.'s attorneys unnecessarily protracted the proceedings.

The appellants also argue that a genuine factual issue exists as to whether they made a reasonable settlement offer more than ten days prior to the due process hearing, thus precluding an attorneys' fee award pursuant to 20 U.S.C. s 1415(e)(4)(D). In support of this argument, they point to evidence in the record that they sent several letters to the plaintiff offering to settle. The contradictory evidence presented by the appellants creates material issues of fact. Shelly C.'s argument that there is sufficient evidence of the reasonableness of the fee awarded by the district court highlights the inappropriateness of summary judgment. Sufficiency of the evidence is not the criteria. Evidentiary conflicts must be resolved at trial, not by summary judgment.

II.

The appellants next contend that the trial court erred in denying their motions to dismiss and for summary judgment because as a matter of law attorneys' fees are not recoverable when a settlement is reached prior to the due process hearing, and the plaintiff is not a party who has prevailed on the merits within the meaning of the HCPA.

[2] In 1986, Congress amended the Education of the Handicapped Act with the HCPA to allow parents to recover attorneys' fees in certain circumstances. Section 1415(e)(4)(B) of the HCPA provides:

In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

In interpreting s 1415(e)(4)(B), we have previously held that fees may be awarded for work performed at the administrative level when a due process hearing is held. Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir.1988) (separate suit for fees is authorized by the HCPA when

they are incurred in successful pursuit of formal administrative proceedings). [FN1] This Court must now decide whether fees may be awarded when a settlement is reached prior to the holding of a due process hearing.

FN1. Our holding in Duane M. also disposes of appellants' argument that North Carolina Dept. of Transp. v. Crest Street Community Council, Inc., 479 U.S. 6, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986), precludes Shelly C.'s federal suit for attorneys' fees.

Section 1415(e)(4)(D) provides: No award of attorneys' fees and costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement ... if--

(i) the offer is made ... in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the ... administrative officer finds that the relief finally obtained by the parent or guardian is not more favorable to the parents or guardian than the offer of settlement.

The implication of this language is that when a written offer is made and accepted more than ten days before a due process hearing is held, attorneys' fees for services up to that time are recoverable. See Rossi v. Gosling, 696 F.Supp. 1079, 1084 (E.D.Va.1988), Robert H. v. Fort Worth Independent School District, 1987-88 EHLR DEC. 559:509 (N.D.Tex.1988). Thus, the HCPA envisions the award of fees when administrative proceedings do not reach the due process hearing stage.

This interpretation is consistent with the legislative history of the Act. [FN2] Congress intended prevailing parents to recover fees for "services performed in connection with [an] administrative proceeding." H.R.Rep. No. 296, 99th Cong., 1st Sess. 5 (1985). Services rendered in anticipation of a due process hearing fall within this authorization. Rossi v. Gosling, 696 F.Supp. at 1084.

FN2. For further examination of the HPCA's legislative history see Duane M. v. Orleans Parish School Bd., 861 F.2d 115, and Eggers v. Pullitt County School Dist., 854 F.2d 892, 894-98 (6th Cir.1988).

Additionally, in enacting the HCPA, Congress looked to 42 U.S.C. s 1988, another fee shifting provision, for guidance. H.R.Rep. at 5-6; H.R. Conf.Rep. No. 687, 99th Cong., 1st Sess. 6 (1985); see also Abu-Sahyun v. Palo Alto Unified School Dist. 843 F.2d 1250, 1252 (9th Cir.1988). Since fees are available under s 1988 when a suit is resolved by consent decree prior to trial, Maher v. Gagne, 448 U.S. 122, 129, 100 S.Ct. 2570,

2574, 65 L.Ed.2d 653 (1980), fees should likewise be available under the HCPA where the complainant obtains the desired relief short of a formal administrative proceeding. Rossi, 696 F.Supp. at 1084 n. 3.

Finally, the appellants contend allowing an award of fees when a settlement is reached prior to the due process hearing provides no incentive for the appellants to settle prior to that time. This argument is not persuasive. It is just as likely that denying fees would protract litigation and thereby increase a school system's liability for fees. As stated in Rossi, 696 F.Supp. 1079:

One can easily envision a situation in which the parents' attorney, knowing that fees are not recoverable for pre-hearing work performed in the absence of a hearing, would reject negotiations and attempt to gain the desired relief through formal proceedings. On the other hand, if fees are recoverable for pre-hearing work, the parents' attorney would have no incentive to resist settlement, and the school system would have an incentive to settle cases as early as possible to avoid further exposure.

Id. at 1084. We therefore hold that attorneys' fees are available under the HCPA for work done prior to the holding of an administrative hearing. In so holding, we in no way determine Shelly C.'s entitlement to attorneys' fees in this case. On remand, the district court may award fees in its discretion if it determines that Shelly C. has complied with the terms of 20 U.S.C. s 1415(e). [FN3]

FN3. This includes a determination as to whether Shelly C. is a "prevailing party" under 20 U.S.C. s 1415(e)(4)(B).

For all the above reasons, we REVERSE and REMAND for further proceedings due process hearing fall within this authorization. Rossi v. Gosling, 696 F.Supp. at 1084.

FN2. For further examination of the HPCA's legislative history see Duane M. v. Orleans Parish School Bd., 861 F.2d 115, and Eggers v. Bullitt County School Dist., 854 F.2d 892, 894-98 (6th Cir.1988).

Additionally, in enacting the HCPA, Congress looked to 42 U.S.C. s 1988, another fee shifting provision, for guidance. H.R.Rep. at 5-6; H.R. Conf.Rep. No. 687, 99th Cong., 1st Sess. 6 (1985); see also Abu-Sahyun v. Palo Alto Unified School Dist. 843 F.2d 1250, 1252 (9th Cir.1988). Since fees are available under s 1988 when a suit is resolved by consent decree prior to trial, Maher v. Gagne, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980), fees should likewise be available under the

HCPA where the complainant obtains the desired relief short of a formal administrative proceeding. Rossi, 696 F.Supp. at 1084 n. 3.

Finally, the appellants contend allowing an award of fees when a settlement is reached prior to the due process hearing provides no incentive for the appellants to settle prior to that time. This argument is not persuasive. It is just as likely that denying fees would protract litigation and thereby increase a school system's liability for fees. As stated in Rossi, 696 F.Supp. 1079:

One can easily envision a situation in which the parents' attorney, knowing that fees are not recoverable for pre-hearing work performed in the absence of a hearing, would reject negotiations and attempt to gain the desired relief through formal proceedings. On the other hand, if fees are recoverable for pre-hearing work, the parents' attorney would have no incentive to resist settlement, and the school system would have an incentive to settle cases as early as possible to avoid further exposure.

Id. at 1084. We therefore hold that attorneys' fees are available under the HCPA for work done prior to the holding of an administrative hearing. In so holding, we in no way determine Shelly C.'s entitlement to attorneys' fees in this case. On remand, the district court may award fees in its discretion if it determines that Shelly C. has complied with the terms of 20 U.S.C. s 1415(e). [FN3]

FN3. This includes a determination as to whether Shelly C. is a "prevailing party" under 20 U.S.C. s 1415(e)(4)(B).

For all the above reasons, we REVERSE and REMAND for further proceedings.

Robert DODDS, Helen DODDS, individually and on behalf of their son, Kevin DODDS, Plaintiffs,

v.

John SIMPSON, individually and in his official capacity; Carl Cole, individually and in his official capacity; and the Josephine County School District, Defendants.

Civ. No. 84-6415-PA.
United States District Court, D. Oregon.
Oct. 26, 1987.

Steven L. Brischetto, Baldwin & Brischetto, Portland, Or., for plaintiffs.
William V. Deatherage, Frohnmayer, Deatherage, Deschweinitz, Pratt & Jamieson, P.C., Medford, Or., for defendants.

OPINION

PANNER, Chief Judge.

Plaintiffs Kevin DODDS and his parents, Helen and Robert Dodds, brought this action against defendants John Simpson, Carl Cole, and the Josephine County School District. A trial was held June 23, 1987. On June 25, 1987, the jury returned a verdict in favor of defendants. Plaintiffs and defendants move for an award of attorney's fees and costs. I deny plaintiffs' motion. I deny defendants' motion for attorney's fees and allow costs.

BACKGROUND

The facts are fully set forth in my opinion of September 11, 1986. Briefly, on March 2, 1983, Mrs. Dodds applied for special education classes for Kevin. On that same day a teacher sent Kevin to defendant Simpson's office for a disturbance on the playground. Simpson was the principal of Kevin's school. Simpson suspended Kevin that day. After two administrative appeals and a public hearing, the District School Board reversed the suspension for failure to follow proper procedure and expunged the suspension from Kevin's record. Following the suspension incident, a multi-disciplinary team evaluated Kevin for special education services. Although Simpson usually did not participate in such evaluations, he participated in Kevin's. The team report concluded that Kevin did not require special education. After the report issued, the Dodds learned that one of the team members, Marjorie Sloan, a learning disability

specialist, did not agree with the report. In her deposition and at trial she testified that she was pressured into filing a report which recommended denying Kevin special education, despite her professional opinion to the contrary.

Based on the team report, the District denied Kevin's application for special education services. The Dodds requested a due process hearing to contest the decision. On July 27, 1983, the parties and their attorneys met with a hearings officer. The parties stipulated that Kevin had specific learning disabilities and would be given special instruction in these areas. The parties also agreed to a stipulated dismissal of the due process hearing. In 1984, plaintiffs brought this action for discrimination under the Rehabilitation Act of 1973, and violations of the Education for All Handicapped Children Act (EHA) and the Fourteenth Amendment of the United States Constitution, pursuant to 42 U.S.C. s 1983. Defendants moved for summary judgment and I granted that motion. Judgment entered. Plaintiffs timely moved to amend the judgment based on the amendments to the EHA, the Handicapped Protections Act of 1986. I granted that motion and reinstated plaintiffs' claims pursuant to 42 U.S.C. s 1983 and for attorney's fees and costs.

On June 23, 1987, a jury trial was held. Two issues were submitted to the jury: whether Kevin Dodds was deprived of his right to an independent evaluation of his special educational needs by the issuance of a false evaluation report, and whether Simpson suspended Kevin for an improper motive. The jury returned a verdict for defendants on both claims.

DEFENDANTS' PETITION FOR ATTORNEY'S FEES AND COSTS

Defendants move for attorney's fees under 42 U.S.C. s 1988. Plaintiffs oppose that motion.

Authority to award attorney's fees under 42 U.S.C. s 1988 applies differently to prevailing plaintiffs and prevailing defendants. Mayer v. Wedgewood Neighborhood Coalition, 707 F.2d 1020, 1021 (9th Cir.1983). Prevailing plaintiffs recover attorney's fees in civil rights litigation "unless special circumstances would render such an award unjust." Id., (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978)). However, a defendant in a civil rights action should not routinely be awarded attorney's fees, simply because he prevailed. Id. If the action brought is found to be unreasonable, frivolous, meritless, or vexatious, a

prevailing defendant is entitled to attorney's fees under 42 U.S.C. s 1988. Id.

When Congress enacted the fee provision, it "intended to promote, not discourage, vigorous enforcement of federal civil rights laws." Jenson v. Stangel, 762 F.2d 815, 818 (9th Cir.1985). Therefore, only under limited circumstances are defendants entitled to attorney's fees, such as where plaintiff knows through discovery that its claims are groundless. Christiansburg, 434 U.S. at 422. A jury verdict against the plaintiff does not itself justify the assessment of fees. Jenson, 762 F.2d at 818.

Defendants contend that this action was frivolous and vexatious. Defendants argue that plaintiffs did not exhaust their administrative remedies prior to filing this suit, that only two of plaintiffs' claims were submitted to the jury and neither was proper under 42 U.S.C. s 1983, and that plaintiffs exhibited hostility toward defendants. Defendants conclude that "while some small portion of plaintiffs' claims may have had some colorable merit, the overwhelming portion was completely frivolous." Defendants Memorandum in Support at 3.

Although there were ill feelings between the litigants, that does not render the litigation vexatious. Nor was this action frivolous. Plaintiffs' attorney by affidavit states that he investigated the action and even interviewed Marjorie Sloan, plaintiffs' primary witness, prior to filing suit. Although I originally granted defendants' motion for summary judgment, that decision was largely based on the Supreme Court's ruling in Smith v. Robinson, 468 U.S. 992 (1984). In Smith, the Court ruled that, in claims such as these, the EHA is an exclusive remedy and that that Act does not provide for attorney's fees and costs at the administrative level. In 1986, Congress amended the EHA, providing that the EHA is not an exclusive remedy and giving the court authority to award attorney's fees. 20 U.S.C. s 1415(e)(4)(B) and (f). Plaintiffs' section 1983 claims were reinstated and two claims went to the jury. Although defendants prevailed at trial, I find that plaintiffs' claims had some merit. I deny defendants' motion for attorney's fees. Defendants also move for costs. I allow that motion.

The prevailing party in a civil rights action is in the same posture as the prevailing party in any other action with regard to costs which are not a part of attorney's fees. Northcross v. Board of Ed., 611 F.2d 624, 640 (6th Cir.1979), cert. denied, 447 U.S. 911 (1980). In a civil rights action, like other actions, costs are awarded pursuant to Fed.R.Civ.P. 54(d). Chavez v. Tempe Union High School Dist., 565 F.2d 1087 (9th Cir.1977). Under that rule, "costs shall be allowed as of course to the prevailing party."

Fed.R.Civ.P. 54(d). I find no reason not to award costs. I grant defendants' motion for reasonable costs, other than attorney's fees.

PLAINTIFFS' PETITION FOR ATTORNEYS' FEES AND COSTS

Plaintiffs move for an award of attorney's fees and costs incurred in preparation for the due process hearing in 1983. Defendants oppose that motion.

Plaintiffs contend that under the Handicapped Children's Protection Act of 1986, I have discretion to award fees and costs at the administrative hearing level. That Act provides:

In any action or proceeding brought under this subsection the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party. 20 U.S.C. s 1415(e)(4)(B) (1986) (emphasis added).

The attorney fee provision of the 1986 amendment was modelled after the fee provision of Title VII of the Civil Rights Act of 1964 in that Congress intended that a party who prevails at the administrative level be eligible for a fee award. Cf. 20 U.S.C. s 1415(e) to 42 U.S.C. s 2000e-5(k); see S.Rep. No. 112, 99th Cong., 1st Sess. at 14 (committee intended that fee provision be interpreted consistent with Title VII authorizing "courts to award fees for time spent by counsel in mandatory administrative proceedings"). Plaintiffs urge that the mere fact that they obtained the relief sought through settlement, rather than litigation, does not preclude an award of attorney's fees, citing Maher v. Gagne, 448 U.S. 122, 129 (1980). Defendants urge that the statute only authorizes an award of fees at the administrative level and, because the parties settled prior to the due process hearing, plaintiffs are not eligible for an award. Defendants contend that Maher only applies to actions which settle while pending in court and cannot be extended to apply to a proceeding which settles prior to an administrative hearing. Defendants argue that since plaintiffs were not appealing an adverse administrative ruling, nor did they succeed at trial on any of their claims, they are not entitled to fees.

Assuming that under the new amendments I have discretion to award fees to a party who obtains the relief sought through settlement prior to an administrative hearing, I decline to award such fees and costs. The Act is designed to resolve issues at the administrative level and to avoid costly litigation. The parties successfully reached a settlement prior to the due process hearing. The parties avoided both the costs of the formal due

process hearing and subsequent litigation over Kevin's right to special education. To find defendants liable for fees and costs would create a disincentive for such prehearing settlements. In the interests of promoting such settlements, I decline to award fees and costs.

CONCLUSION

I deny plaintiffs' motion for attorney's fees and costs. I deny defendants' motion for attorney's fees and allow reasonable costs.

ORDER

Plaintiffs' motion for attorney's fees and costs is DENIED. Defendants' motion for attorney's fees is DENIED. Defendants' motion for costs is GRANTED.

IT IS SO ORDERED.

D.Or.,1987. DODDS v. SIMPSON 1987 WL 49461 (D.Or.)

No. 89-788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VENUS INDEPENDENT SCHOOL DISTRICT,
GRANDVIEW INDEPENDENT SCHOOL DISTRICT,
and JOHNSON COUNTY SPECIAL EDUCATION COOPERATIVE,
Petitioners,

v.

SHELLY C., b/n/f
MR. AND MRS. SHELBIE C.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

May attorney's fees be awarded under the Handicapped Children's Protection Act, 20 U.S.C. §1415(e)(4)(B), after a parent requests a due process hearing and settlement/final resolution is reached prior to convening an administrative hearing?

LISTING OF PARTIES

Venus Independent School District - Defendants/ Appellants/Petitioners

Grandview Independent School District - Defendants/ Appellants/Petitioners

Johnson County Special Education Cooperative - Defendants/Appellants/Petitioners

Shelley C., b/n/f Mr. and Mrs. Shelbie C. - Plaintiffs/ Appellees/Respondents

Texas Association of School Boards - Amicus Curiae

Martha C. Wright of Wright & Associates, P.C. - Attorney for Defendants/Appellants/ Petitioners

Mark S. Partin of Advocacy, Incorporated - Attorney for Plaintiffs/Appellees/Respondents

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v.

SHELLY C., b/n/f
MR. AND MRS. SHELBIE C.,

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**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was made and entered on August 2, 1989. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

Shelley C., Respondent in this action, concurs with Petitioners', Venus Independent School District (hereinafter "Venus ISD"), the Grandview Independent School District (hereinafter "Grandview ISD") and the Johnson County Special Education Cooperative (hereinafter "Coop"), statement of the Nature of the Case except as follows:

This is an action for the recovery of an award of a reasonable attorneys' fee brought under the Handicapped Children's Protection Act, 20 U.S.C. §1415(e)(4)(B), for hours expended in achieving a settlement of the substantive issues while pursuing administrative remedies.

Shelley C. filed a Request for a Due Process Hearing on September 8, 1986. The hours expended in settlement negotiations occurred *after* the initiation of the administrative proceedings as provided by Section 1415 of the Education of the Handicapped Act (EHA). Final resolution of the issues pending before the Special Education Hearing Officer for the State of Texas was obtained after a Prehearing Conference and prior to the convening of a hearing on the merits.

B. Statement of Facts

Shelley C., asserts that Respondents' Statement of Facts is unduly argumentative and contains a number of assertions that are irrelevant to the Question Presented for Review. Specifically, the chronology of events and their factual accuracy and significance have not been established and have no bearing on the Question Presented for Review. The Fifth Circuit Court

of Appeals remanded this action to the District Court to resolve these evidentiary conflicts, as well as to determine the reasonableness of the attorneys' fees.

Shelley C. attempted to resolve the issue of recovering a reasonable attorneys' fee for time expended in pursuing administrative proceedings without resort to further litigation. When informal attempts to recover attorneys' fees failed, Shelley C. filed an action in federal district court for recovery of reasonable attorneys' fees and costs. The Venus ISD filed a Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. On May 12, 1988, the district court denied their Motion to Dismiss, concluding that negotiations prior to a hearing constitute "proceedings" under the EHA. The parties filed Cross-Motions for Summary Judgment based on a Stipulated Statement of Facts, and on December 15, 1988, the district court granted Shelley C.'s Motion for Summary Judgment, denied Venus ISD, Grandview ISD and the Coop's Motion for Summary Judgment, and awarded reasonable attorneys' fees and costs in the amount of $30,533.62.

On January 11, 1989, the Venus ISD, the Grandview ISD and the Coop appealed the granting of summary judgment to the Fifth Circuit Court of Appeals. The Petitioners were *successful* in obtaining a ruling from the Fifth Circuit Court of Appeals overturning the district court's granting of Shelley C.'s Motion for Summary Judgment. The Fifth Circuit Court of Appeals remanded the cause to the district court to determine prevailing party status and the reasonableness of an award of attorneys' fees. The Fifth Circuit Court of Appeals held that an award of

attorneys' fees for hours expended in settlement negotiations was consistent with the Handicapped Children's Protection Act. After their success at the Fifth Circuit Court of Appeals, the Venus ISD, the Grandview ISD and the Coop have filed a Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Shelley C. asserts that an award of attorneys' fees for time expended in negotiating final resolutions of issues pending before a hearing officer prior to the time that a hearing on the merits is convened is allowed under the Handicapped Children Protection Act and is consistent with Congressional intent. Shelley C. asserts that the Fifth Circuit Court of Appeals is correct in ruling that settlement negotiations are proceedings under the Handicapped Children's Protection Act. Shelley C. asserts that an award of attorneys' fees for hours expended during administrative proceedings is allowed under the Handicapped Children's Protection Act. Shelley C. asserts that all Circuit Courts of Appeal that have addressed the issue of awarding attorneys' fees for hours expended pursing administrative remedies have agreed that an award is available.

Shelley C. asserts that Respondents' reliance on the panel decision of the D.C. Circuit Court of Appeals in *Lani Moore v. District of Columbia*, 886 F.2d 335 (D.C. Cir. 1989), is without basis as that decision was *vacated* when the court granted a motion for rehearing *en banc*. The D.C. Circuit Court of Appeals has scheduled the *Lani Moore* appeal for rehearing on May 9, 1990.

ARGUMENT

THE COURT OF APPEALS IS CORRECT IN RULING THAT ATTORNEYS' FEES MAY BE AWARDED AFTER INITIATION OF ADMINISTRATIVE PROCEEDINGS WHEN SETTLEMENT IS REACHED PRIOR TO A HEARING ON THE MERITS.

A. THE FEES WERE INCURRED IN SETTLEMENT NEGOTIATIONS AFTER INITIATION OF THE MANDATORY ADMINISTRATIVE PROCEEDINGS AND PRIOR TO CONVENING A HEARING ON THE MERITS.

Shelley C. filed an application for costs and attorneys' fees under the Handicapped Children's Protection Act (HCPA), 20 U.S.C. §1415(e)(4)(B), after obtaining the relief sought through initiation of the mandatory administrative proceedings by settlement prior to convening a hearing on the merits. The HCPA grants the district court the discretion to award a reasonable attorneys' fee for hours expended in any action or proceeding brought under this subsection. Shelley C. filed a Request for a Due Process Hearing on September 8, 1986. The Hearing Officer convened a Prehearing Conference on October 3, 1986. After four months of negotiations, on February 17, 1987, the parties were able to resolve the issues pending before the Hearing Officer without resort to a hearing on the merits. After failing to reach agreement on the payment of a reasonable attorneys' fee, Shelley C. filed an action in federal district court on February 24, 1988.

The Fifth Circuit Court of Appeals is correct in ruling that the HCPA allows the district court to award attorneys' fees for hours expended negotiating a settlement of the issues pending before the Hearing Officer. The language of the HCPA shows that an

award of attorneys' fees is anticipated. Section 1415(e)(4)(D) provides for the reduction of the amount of fees awarded for hours expended negotiating a settlement under certain circumstances. The HCPA states that

> No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian if—
>
> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, *in the case of an administrative proceeding*, at any time more than ten days before the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court or *administrative officer* finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

20 U.S.C. §1415(e)(4)(D) (emphasis added).

If Congress had intended that no fees be allowed for hours expended at the mandatory administrative level when settlement is reached, then they would not have enacted a process for determining when such an award of fees is inappropriate. Congress clearly stated their preference for settlement in §1415(e)(4)(D). That section, as discussed above, contains a three-step process for making a determination on when the court

or administrative officer can limit the award of attorneys' fees after a written offer of settlement has been made. The court *or administrative officer* must determine that the written offer of settlement was made at least ten days prior to the proceedings, that the offer was not accepted within ten days, and that the relief finally obtained by Shelley C. was not more favorable than that contained in the offer of settlement. Once the court *or administrative officer* has made a determination on all three of these issues, the court *or administrative officer* can limit an award of fees to the time expended prior to the written offer of settlement. Congress intended the courts to award fees for time expended prior to the hearing; otherwise, §1415(e)(4)(D), as it relates to the mandatory administrative proceedings, is rendered meaningless. Shelley C. asserts that the Fifth Circuit Court of Appeals' application of this section allowing the district court to award attorneys' fees for time expended pursuing administrative remedies is correct.

Shelley C. asserts than an award of attorneys' fees for time expended in negotiating the final resolution of issues pending before a hearing officer prior to the time that a due process hearing is convened is allowed under the HCPA and consistent with Congressional intent. Shelley C. further asserts that, in addition to mandating an award of attorneys' fees, the HCPA authorizes a separate suit to be brought for those fees when they are incurred in the successful pursuit of administrative remedies.

Six of the Circuit Court of Appeals have addressed this issue and all have agreed that the HCPA grants discretion to the district court to award fees for hours expended pursuing mandatory administrative pro-

ceedings. *See, Counsel v. Dow*, 849 F.2d 731 (2nd Cir. 1988), *cert. denied*, 109 S.Ct. 391 (1988); *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3rd Cir. 1988); *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988); *McSomebodies (No. 1) v. Burlingame Elementary School District*, 886 F.2d 1558 (9th Cir. 1989); *McSomebodies (No. 2) v. San Mateo City School District*, 886 F.2d 1559 (9th Cir. 1989); *Mitten v. Muskogee County School District*, 877 F.2d 932 (11th Cir. 1989).

Petitioners rely on *North Carolina Department of Public Transportation v. Crest Street*, 479 U.S. 6 (1986), where the court held that no separate federal action could be brought to recover attorneys' fees under 42 U.S.C. §1988. The *Crest Street* decision was rendered *after* the enactment of the HCPA. The Petitioners argue that *Crest Street* indicates that a parent may not maintain an action solely for the recovery of attorneys' fees. Shelley C. asserts that *Crest Street* rejected certain dicta in *Gaslight Club v. Carey*, 447 U.S. 54 (1980), to which Congress favorably referred in discussing the effect of §1415(e)(4)(B) on awards of fees for hours spent at the administrative level.

Shelley C. asserts that the Petitioners reliance on *Crest Street* is misplaced for several reasons. First, the statutory language of the two attorneys' fees provisions differs in that the wording of §1415(e)(4)(B) is less narrow than that of §1988. Section 1415(e)(4)(B) refers to "any action or proceeding brought under this subsection" while §1988 refers to "any action or proceeding to enforce a provision of §§1981, 1982,

1983 . . . ." Second, unlike the legislative history of §1988, the legislative history of §1415(e)(4)(B) indicates Congressional intent that attorneys' fees incurred at the administrative level may be recovered in an independent action. Third, Congress clearly adopted the view that the dicta of *Carey*, which indicated that one could sue under Title VII solely for an award of attorneys' fees for legal work done in state and local proceedings, was the position that Congress intended for the operation of §1415(e) notwithstanding the later decision in *Crest Street*. See, H.R. Rep. 99-296, 99th Cong. 1st Sess. 5 (Oct. 2, 1985); S.Rep. No. 99-112, 99th Cong., 2d Sess. 14; 131 CONG. REC. S10400 (July 30, 1985) (remarks of Sen. Simon).

Additionally, §1415 does not restrict the award of attorneys' fees only to suits brought to enforce rights created by the Education of the Handicapped Act. This is evidenced by the fact that the HCPA specifically refers to potential restrictions on attorney fee awards for work done in administrative proceedings. As previously stated herein, §1415(e)(4)(D) limits an award of attorneys' fees in any "action or proceeding" when, in the case of an administrative proceeding, the local educational authority made an offer of settlement more favorable than the final ruling within ten days of that proceeding's commencement to hours expended prior to the offer of settlement.

In *Duane M.*, the Fifth Circuit Court of Appeals gave an exhaustive review of the legislative history of the HCPA and stated that "Members of both Houses of Congress expressed similar reasons for awarding attorneys fees for legal representation at the administrative level." *Duane M.* at 120. In *Duane*

M., the court also relied on the Sixth Circuit's opinion in *Eggers*, where the court gave an exhaustive review of the legislative history of the HCPA. The legislative history clearly establishes that Congress intended to authorize the courts to award a reasonable attorneys' fee for time expended pursuing administrative remedies. In *Duane M.*, at 117 n. 2, the Court listed the cases that have addressed the issue of whether a parent may bring a separate suit for attorneys' fees. Shelley C. asserts that she has the right to bring a suit solely for the purpose of obtaining attorneys' fees when final resolution was obtained prior to the convening of the due process hearing.

Petitioners assert, at pp. 6-7 of their Writ of Certiorari, that there are no cases to support the Fifth Circuit Court of Appeals' decision to award fees for time expended resolving the issues pending before the hearing officer prior to convening a hearing on the merits. Shelley C. asserts the opposite. In *Robert H. v. Fort Worth Independent School District*, EHLR DEC. 559:509 (N.D.Tx. June 1, 1988), the court determined that the plaintiff had prevailed by obtaining a pre-hearing settlement and awarded attorneys' fees and costs. In *Rossi v. Gosling*, 696 F.Supp 1079 (E.D. VA. 1988), the court determined that the plaintiff had prevailed by obtaining a pre-hearing settlement and awarded reasonable attorneys' fees and costs. In *Anderson v. Syracuse*, Cause No. 88-CV-122 (N.D. N.Y. February 3, 1989) [available on WestLaw] 1989 WL 8664, the court ruled that the plaintiff had prevailed by obtaining a pre-hearing settlement and awarded a reasonable attorneys' fees and costs. Shelley C. asserts that the Fifth Circuit Court of Appeals' decision that a district court has the discretion to award fees

and costs for time expended pursuing administrative remedies prior to convening a hearing are covered by the HCPA is correct.

B. LANI MOORE V. DISTRICT OF COLUMBIA

Petitioners assert that there is a conflict among the Circuit Courts and cite *Lani Moore v. District of Columbia*, 886 F.2d 335 (D.C. Cir. 1989), in support of this assertion. Shelley C. asserts that this decision was vacated when the D.C. Circuit Court of Appeals granted a motion for rehearing *en banc*. *See*, Order scheduling rehearing *en banc* for May 9, 1990. (Appendix A), and the Handbook of Practice and Internal Procedures, Circuit Court of Appeals for the District of Columbia, XIII.B.2, pp. 66-69, August 1, 1987 (Appendix B at 5a).

Shelley C. asserts that no conflict exists among the Circuit Courts and that should a conflict arise as a result of the *en banc* decision of the D.C. Circuit Court of Appeals in *Lani Moore*, plenary review of that decision may be appropriate by the United States Supreme Court.

C. AN AWARD OF ATTORNEYS' FEES FOR HOURS EXPENDED IN PREHEARING SETTLEMENT NEGOTIATIONS IS CONSISTENT WITH THE HCPA AND PUBLIC POLICY.

Petitioners assert that to award fees for time spent prior to a hearing is contrary to public policy. Shelley C. asserts that had Congress intended to preclude an award of attorneys' fees for work performed after a written offer of settlement, they would have clearly stated so; instead, Congress enacted a very specific three-step process in §1415(e)(4)(D) with which Venus ISD failed to comply. By enacting the HCPA, Con-

gress has made clear that it is public policy to award reasonable attorneys' fees and costs to parents or guardians of children with disabilities who prevail in an action brought under the EHA.

Petitioners assert that this court should adopt the reasoning that the district court applied in *Dodds v. Simpson*, EHLR DEC. 559:320 (D.Or. October 26, 1987). In *Dodds*, the district court assumed that it had the discretion to award fees for a prehearing settlement and in exercising that discretion declined to award fees. The *Dodds* decision was decided prior to the Ninth Circuit Court of Appeals decisions in *McSomebodies (No. 1)* and *McSomebodies (No. 2)*, where the court ruled that parents who prevail at the administrative level may bring an action in district court to recover an award of attorneys' fees. Shelley C. asserts that the district court has the discretion to award attorneys' fees and costs incurred at the administrative level and that the Fifth Circuit Court of Appeals is correct in so holding.

CONCLUSION

As a matter of law, Shelley C. is entitled to an award of reasonable attorneys' fees and costs as a prevailing party for hours expended after initiating the mandatory administrative proceedings and reaching settlement prior to convening a hearing on the merits. Further, the Fifth Circuit Court of Appeals was correct in remanding this cause to the district court to further develop the facts and resolve any evidentiary conflicts.

PRAYER FOR RELIEF

FOR THE FOREGOING REASONS, the Petitioners Writ of Certiorari should be denied and the decision

of the Fifth Circuit Court of Appeals should be affirmed. Further, Shelley C. should be awarded reasonable attorneys' fees and costs incurred in responding to this Writ.

Respectfully submitted,

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State Bar No. 15550800

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APPENDIX

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 88-703

September, Term, 1989

CA 87-00941

Lani Moore, et al.
v.
District of Columbia, et al.
Appellants

BEFORE: Wald, Chief Justice; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

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ORDER

Upon consideration of the motions of Senator Tom Harkin, et al. and For Love of Children, Inc. for leave to participate as *amici curiae* on rehearing *en banc* it is

ORDERED, by the Court *en banc*, that the motions are granted and it is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that oral argument in this case will be heard by the Court sitting *en banc* at 10:00 A.M. on Wednesday, May 9, 1990. It is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that appellants and appellees shall

file briefs of no more than forty pages and shall do so on April 2, 1990. *Amici* may file briefs of no more than twenty pages on the same date. The joint appendix shall be filed on April 9, 1990. Thirty copies of each brief and of the joint appendix shall be submitted.

Amici are cautioned that they should coordinate with appellees and with each other so as to avoid duplicate briefing.

Time at oral argument will be governed by a further order.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK
BY:
Robert A. Bonner
Deputy Clerk

APPENDIX B

HANDBOOK OF PRACTICE

and

INTERNAL PROCEDURES

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA

August 1, 1987

XIII. POST-DECISION PROCEDURES
B. Reconsideration
2. Rehearing En Banc

(See Rule 35, Federal Rules of Appellate Procedure; (.D.C. Cir. Rule 15(a).)

Like petitions for rehearing by a panel, suggestions for rehearing *en banc* are frequently filed but rarely granted. Rule 35(a) of the Federal Rules of Appellate Procedure expressly states that *en banc* hearings are not favored and ordinarily will not be ordered except to secure uniformity of decisions among panels of the Court, or to decide questions of exceptional importance.

The formal requirements for a suggestion for rehearing *en banc* partly duplicate, and partly differ from, those of a petition for rehearing by the panel. The suggestion must be filed within 30 days after entry of the judgment if the United States or a federal agency is a party. It must begin with a section entitled "Concise Statement of Issue and Its Importance" that sets forth why the case is of exceptional importance or cites the decisions with which the panel judgment is claimed to be in conflict. An original and 19 copies must be filed. The suggestion cannot be more than 11 printed pages in length, or 15 typewritten pages; motions to exceed this limitation are rarely granted.

If a party is submitting both a petition for rehearing by the panel, and a suggestion for rehearing *en banc*, the two should be combined in the same document, in which event an original and 19 copies should be filed, and the page limits for the combined pleading are 11 printed or 15 typewritten pages. If the two pleadings are filed separately, they may not, combined, exceed these page limits.

As in the case of petitions for rehearing, the rules do not provide for a response to a suggestion for rehearing *en banc*, absent leave of the Court. If a majority of active judges wish a response, the Clerk will enter an order to that effect. There is no oral argument on the question of whether rehearing *en banc* should be granted.

Unlike a petition for rehearing, a suggestion for rehearing *en banc* filed by itself does not automatically stay issuance of the mandate; counsel must move for a stay.

The Clerk transmits the suggestion for rehearing *en banc* to all members of the original pane, including a senior judge of this Court, or a judge visiting from another court, and to all other active judges of this Court. The Clerk sends a vote sheet and, for non-panel members, copies of any opinions or memoranda issued by the original panel. The judges have seven working days to call for a vote on the suggestion. A vote may be requested by any active judge of the Court, or by any member of the panel. If no judge asks for a vote within that time, and on requests more time to consider the matter, the Clerk will enter an order denying the suggestion.

If a judge calls for a vote on the suggestion for rehearing *en banc*, the Clerk immediately sends to the full Court a new vote sheet. The question now is whether there shall be a rehearing *en banc*. On this question only active judges of the Court may vote, and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing *en banc* in order for it to be granted. The judges have 10 days within which to vote. On the

seventh day, the Clerk provides a status report to the judges. If a majority vote is not received in the 10-calendar day period, the *en banc* request will be denied.

Occasionally a judge desires more time to consider the *en banc* suggestion and circulates a memorandum to the full Court so indicating. The foregoing procedures are then stayed for a reasonable period to permit the judge to review the case further. Moreover, during the summer when a number of judges may be away from the Court, the Clerk is authorized to relax the time limits.

When rehearing *en banc* is granted, the Clerk enters an order which vacates the judgment and opinion by the original panel, either in whole or in part, as circumstances warrant. This order is circulated to all who subscribe to the Court's opinions. An order granting rehearing *en banc* does not show the names of the judges who dissented, but an order denying rehearing *en banc* does show the names of the judges who voted to grant rehearing *en banc*.

The Court setting *en banc* consists of all active judges, plus any senior judges of the Court who were members of the original panel, and who wish to participate, but not visiting judges from other courts. When the Court sits *en banc* with an even number of judges, and the result is an evenly-divided vote, the Court will affirm the order or judgment under review, regardless of the panel decision, but it may publish the *en banc* Court's divided views.

In the absence of a request from a party, any active judge of the Court, or member of the panel, may suggest that a case re reheard *en banc*. If a majority of the active judges agree, the Court orders rehearing *en banc*.

In addition, a party may move for *en banc* consideration prior to a panel decision. If a party wishes a case to be heard initially *en banc*, counsel ideally should file the suggestion within the first thirty days after docketing, but in

no event than the date on which the appellee's or the respondent's brief is due. A judge also may suggest *en banc* consideration prior to the panel decision; on occasion this has been done by the panel itself.